83-120 No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE NEW YORK RACING ASSOCIATION INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD

—and—

NEW YORK STATE LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 21, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err and disregard controlling precedents of this Court in holding (i) that Section 14(c)(1) of the National Labor Relations Act ("NLRA") provides no "law to apply" to enable district court review of whether the National Labor Relations Board ("NLRB" or "the Board") abused its discretion in declining jurisdiction over all labor disputes in the horseracing industry and (ii) that, subject only to "the requirement of [Section 14(c)(1)'s] proviso" (which requires the Board to retain the jurisdiction it asserted in August 1959), Section 14(c)(1) authorizes the NLRB to decline jurisdiction "even if the effect on commerce of disputes in a particular case or industry is substantial"?

2. Did the Court of Appeals err in holding that the Board did not violate NLRA § 14(c)(1) in promulgating and continuing to date to adhere to its horseracing industry rule, 29 C.F.R. § 103.3 (1982) ("Rule 103.3"), when—

> (i) the enormous impact of the horseracing industry in general and of petitioner in particular on commerce was conceded;
>
> (ii) such enormous impact at the very least creates an inference (or rebuttable presumption) that a labor dispute in the industry would have a "substantial effect on commerce";
>
> (iii) none of the factors put forth by the NLRB as the putative basis for promulgating and adhering to Rule 103.3 refute the foregoing presumption or rationally support the conclusion that labor disputes in the horseracing industry do not have a "substantial effect on commerce"; and
>
> (iv) in any event, none of those factors, whatever their possible validity in the past, today applies to the business of petitioner?

3. Did the Court of Appeals err in holding—in direct conflict with the Court of Appeals for the Eleventh Circuit and in disregard of earlier precedents of this Court—that the district court could not review the propriety of the NLRB's dismissal of an election petition on the ground that certain judicially-imposed prerequisites to such review allegedly were not met, when—

(i) the policy reasons underlying the imposition of those prerequisites are completely absent in this case;

(ii) judicial review of the NLRB's clearly erroneous and wholly unsubstantiated dismissal of the petition otherwise will be completely foreclosed; and

(iii) the prerequisites were satisfied here in any event?

PARTIES BELOW

All parties to this proceeding are identified in the caption. Petitioner, The New York Racing Association Inc., states, pursuant to this Court's Rule 28.1, that it has no parent companies and no subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The New York Racing Association Inc. ("NYRA"), respectfully prays that a writ of *certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 10, 1983.

OPINIONS BELOW

The opinion and judgment of the Second Circuit directing dismissal of NYRA's complaint, ____ F.2d ____, Nos. 82-6252, 82-6258 (2d Cir. May 10, 1983), is reproduced in the Appendix

hereto.[1] (1a) The Second Circuit reversed a memorandum opinion and order of the United States District Court for the Eastern District of New York (Weinstein, J.), 110 L.R.R.M. (BNA) 3177 (July 28, 1982) (26a), and a judgment of that Court filed July 30, 1982 (41a) which had directed the NLRB to reconsider its refusal to assert regulatory jurisdiction over the labor relations of NYRA.

JURISDICTION

The Second Circuit's judgment was entered on May 10, 1983. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

This proceeding puts in issue Sections 701(a) and 702 of the Administrative Procedure Act, 5 U.S.C. §§ 701(a), 702 (1976); Sections 9(c)(1) and 14(c)(1) of the National Labor Relations Act, 29 U.S.C. §§ 159(c)(1) and 164(c)(i) (1976), and the NLRB's horseracing industry rule, Rule 103.3, 38 *Fed. Reg.* 9507 (1973), 29 C.F.R. § 103.3 (1982). Their texts are reproduced in the Appendix.

STATEMENT OF THE CASE

This petition seeks to prevent a significant erosion of a fundamental safeguard against abuse of administrative discretion that has been firmly established by this Court—namely, that even when such action is committed to agency discretion by law, judicial review to correct its abuse is available except only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *See*

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1 Pages of the Appendix bound with this Petition are cited as "__a".

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402, 410 (1971) ("*Overton Park*"). The Court of Appeals for the Second Circuit has here reversed the district court and held that the body of NLRA § 14(c)(1) provides no "law to apply" to enable judicial review of Rule 103.3, the Board's horseracing industry rule. The Court of Appeals has further held that the Board is free to decline jurisdiction "even if the effect on commerce of disputes in a particular industry is substantial" (13a).

The Court of Appeals has reached these results even though (i) the NLRB itself acknowledged that the body of NLRA § 14(c)(1) imposes a requirement that the Board may invoke that section to decline jurisdiction only "if such labor disputes will not have a substantial impact on commerce" (54a) and (ii) this Court has confirmed that the congressional delegation of administrative discretion set forth in the body of Section 14(c)(1) only "grants the Board power to decline jurisdiction over labor disputes with insubstantial effects," *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 20 n.10 (1963).

As a consequence of ignoring these conclusions, the Second Circuit has refused to disturb an administrative determination which gave no "consideration [to] the relevant factors," *Overton Park*, *supra*, 402 U.S. at 416-17, *i.e.*, those relating to the effect of a labor dispute on commerce, and which the Board refuses to alter even though the extraneous factors which the Board did consider have no bearing on NYRA's business today. It did so despite the fact that that business, and the enormous volume of commerce with which it is inextricably entwined, have been continuously wracked by a constant stream of costly, disruptive labor disputes.

A. NLRB Rule 103.3

The Board's horseracing industry rule, 29 C.F.R. § 103.3 (1982), is the sole basis for its continuing refusal to assert its regulatory jurisdiction over the labor relations of NYRA, the owner and operator of three major race tracks in New York State. The rule was promulgated in 1973, 38 *Fed. Reg.* 9507 (53a), and provides:

> "The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the act involving the horseracing and dogracing industries." (53a)

The Board prescribed this rule as a putative exercise of the special rule-making authority granted to it by NLRA § 14(c)(1), added by 73 Stat. 541 (1959), *as amended*, 29 U.S.C. § 14(c)(1) (1976). (52a) In contrast to the wholly unqualified general rule-making authority conferred on the Board by NLRA § 6, 49 Stat. 452 (1935), *as amended*, 29 U.S.C. § 156 (1976),[2] Section 14(c)(1) states:

> "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to [the Administrative Procedure Act], decline to assert jurisdiction over any labor dispute involving any class or category of employers, *where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction*: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." [3] (52a)

When the NLRB adopted Rule 103.3, it expressed, in an accompanying statement of basis and purpose, 38 *Fed. Reg.* 9537 (1973) (53a), its view of the authority granted by Section 14(c)(1) as follows:

> "*Under section 14(c) of the act, the Board in its discretion may decline to assert jurisdiction over labor disputes involving any class or category of employers if such labor disputes will not have a substantial impact in commerce*

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2 Section 6 provides: "The Board shall have authority from time to time to make, amend and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

3 Emphasis supplied here and elsewhere throughout except where otherwise indicated.

and provided that it had not asserted jurisdiction over such class or category prior to August 1, 1959." (53a)

Despite the foregoing, the NLRB did *not* take issue with the facts that the horseracing industry in general and NYRA in particular then (and even more so today) dwarfed the gross dollar volume standards that the Board had established as a general guide to the assertion of its jurisdiction prior to August 1, 1959 and that they were (and are) inextricably involved in commerce on a massive scale. *Nor* did the NLRB premise its exclusionary rule on any explicit finding that labor disputes in the horseracing industry did not have a substantial effect on such commerce. The NLRB conducted *no* analysis of the actual effect of such labor disputes on commerce.[4] *Nor* did the NLRB purport to base its action on any analysis of the nature and extent of collective bargaining in the horseracing industry, or the manner in which labor relations functions are performed, or any other labor dispute-related factor. Rather, the Board simply noted that it had consistently declined, in the past, to assert jurisdiction over cases arising in the horseracing industry,[5] and then gave the following five reasons for codifying this practice as a rule:

(1) "*[E]xtensive State control.*" (54a) Specifically, the NLRB found:

> "It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the Industries through State racing commissions, and in

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4 The Board simply invited unsworn commentary on its proposed rule. The result of this popularity poll was hardly surprising. Many race track employers, particularly those in states having no "little Wagner Acts", were delighted to have no regulation at all.

5 *E.g., Centennial Turf Club, Inc.*, 192 N.L.R.B. 698 (1971); *Meadow Stud, Inc.*, 130 N.L.R.B. 1202 (1961).

> many States retains the right to effect the discharge of employees whose conduct jeopardizes the 'integrity' of the Industry." (54-55a)

(The NLRB did *not* assert that (much less attempt to explain how or to what extent) any of these above-quoted State regulatory factors impacted labor disputes in the horseracing industry or whether or how they affected labor relations or collective bargaining (and hence might be said to influence, at least indirectly, the effect on commerce of the industry's labor disputes). Moreover, *none* of the above factors appears, on its face, to do so. *Nor* did the NLRB contend that these factors, either singly or collectively, impacted horseracing differently from the way they affect the many other State-regulated industries over which the Board has long exercised jurisdiction.)

(ii) "*[U]nique and special relationship" of the industry with the States.* (55a) (The NLRB statement accompanying Rule 103.3 explained that this "relationship" referred to the substantial revenue source represented by State taxation of racetrack betting. But, again, the Board did *not* claim that, insofar as collective bargaining, labor-management relations or any other labor dispute-related factors are concerned, the States treat horseracing any differently from other private sector employers, unions and employees.[6])

(iii) "*[S]poradic nature of the employment.*" (55a) Specifically, the NLRB stated:

> "[T]he sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work

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6 And, in fact, they do not do so. In New York, for example, its Public Employment Relations Board ("PERB") and its Taylor Law forbidding public sector strikes, N.Y. Civ. Serv. Law §§ 200 *et seq.* (McKinney 1983), have no application to NYRA.

> force. This is further evidenced by a pattern of short workhours and sporadic and short periods of active employment with any given employer." (55a)

(The NLRB did *not* assert that a labor dispute in a seasonal, sporadic industry would have a lesser effect on commerce than one in a year-round industry. Indeed, it would logically appear that the very opposite is so—*i.e.*, in a seasonal industry, labor disputes can have a particularly devastating effect since there may be no time to retrieve production once it is lost. *Nor* did the NLRB assert that the seasonal, sporadic factors to which it alluded cause labor disputes in the horseracing industry to affect commerce any less than such disputes in the plethora of other seasonal, sporadic industries over which the NLRB does assert jurisdiction. In any event, as will be seen, *none* of the factors noted above applies to NYRA which is a year-round, full-time, six-day-a-week employer with a large, stable, permanent, highly-unionized and militant workforce.)

(iv) *"[P]ause with respect to the effectiveness" of regulation by the NLRB.* (55a) (This was a deduction from the sporadic-employment factor which, in the case of NYRA, in no way applies. In any event, the NLRB did *not* claim that this factor bears on the disruptiveness of a strike on commerce. The NLRB did *not* deny that if it, with its nationwide jurisdiction, perceives administrative difficulty in exercising its jurisdiction,[7] the problems which would be encountered by whatever geographically-confined State labor authorities may exist logically would be even greater—and the effect on commerce of a labor dispute that much more exacerbated by the inability of the States to require effective labor dispute resolutions.)

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7 The NLRB's statement spoke of "the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the act within the highly compressed timespan of active employment which is characteristic of the industries". (55a)

(v) "*[R]elatively few labor disputes.*" (55a) (Again, this is *not* at all true *vis-a-vis* NYRA, *see* pp. 9-11, *infra*; but even if it were, frequency of disputes is hardly a measure of the impact of the disputes which do occur—as the singular PATCO-air traffic controllers strike of 1981 so amply demonstrates.)

The five factors which the Board relied upon when adopting Rule 103.3, are immaterial to any realistic analysis of the impact on commerce of disputes in the horseracing industry. But even if this were not so, the Board made *no* attempt to limit the Rule to those particular industry members to whom these factors related in fact—*i.e.*, those whose employment is sporadic (*i.e.*, seasonal or part-time or both), or whose unique regulatory relations with the States include labor relations which are subject to mandatory arbitration and other facets of State public employment relations laws, or which fall below some designated annual dollar volume. Instead, Rule 103.3 applies globally, without differentiation, to all horseracing industry members, no matter how independent their labor relations from State control, no matter how stable their workforce, and no matter how devastating the impact of their labor disputes on commerce will be.

B. NYRA's Participation in Commerce

As the district court found on the basis of uncontested evidence, NYRA is incorporated under the laws of New York as a private, non-dividend paying racing association. (29-30a) Its principal business is the conduct of thoroughbred horse racing and pari-mutuel wagering thereon at three race tracks which it owns in the State, one in New York City, another on Long Island, and a third at Saratoga Springs. (30a) NYRA conducts this business *six* days a week for at least *fifty-one* weeks each year, alternating its race meetings among its three tracks. (30a) It maintains at each track a *full-time, permanent* unionized staff of maintenance employees who work at that facility the year-round. (30a) The vast majority of its unionized mutuel clerks and other employees also are permanent year-

round employees who either work full time in NYRA's principal offices at the Aqueduct race track in New York City or do so by rotating, with the racing, among the three tracks. (30, 32a) NYRA's workforce is characterized by *low turnover* and *high longevity*. (31a) Its employees are highly organized and presently number more than 1,500. (30, 33a)

NYRA's business generates pari-mutuel wagering at its tracks in an amount which in 1981 exceeded $900,000,000 a year (30a) and was over $920,000,000 in 1982. This figure is augmented by more than an additional *billion* dollars of annual wagers made on NYRA races at various local and regional off-track betting facilities in the State of New York and in other states and countries. (30, 34a) NYRA's business in 1981 generated gross revenues in excess of $189,000,000 a year, including receipts derived from local and nationwide telecasting of NYRA events. (30a) NYRA purchases goods and services in interstate commerce in an amount in excess of $60,000,000 a year. (30a) Additionally, it is well known that owners and trainers constantly and continuously transport thoroughbred horses to NYRA's facilities from points outside of the State of New York, and, after such participation, return those horses to locations in other states. *See Elliott Burch*, 230 N.L.R.B. 1161, 1162-63 (1977). In sum, by virtue of its operations and activities, there is not, and could not reasonably be, any dispute that NYRA is an enterprise intimately involved in interstate commerce and of significant consequence to the economy of the United States.

C. Impact upon NYRA of Rule 103.3

Despite the size and scope of NYRA's activities, the NLRB, by virtue of its Rule 103.3, has refused to assert its regulatory jurisdiction over the labor relations of NYRA. Like any other private employer in New York State over which the NLRB declines to exercise jurisdiction, NYRA has been consigned to the New York State Labor Relations Board (the "NYSLRB").[8]

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8 NYRA stands like a Gulliver compared to the Lilliputian statures of the other enterprises which serve as clients of the NYSLRB.

But the statute administrated by that State agency, N.Y. Labor Law §§ 700 *et seq.* (McKinney 1977), makes no provision for union unfair labor practices; Section 8(b) of the NLRA, added by Act of June 23, 1947, Ch. 120, 61 Stat. 140, *as amended*, 29 U.S.C. § 158(b) (1976), has no counterpart in New York's "little Wagner Act."

As a consequence, NYRA has been wracked by a constant stream of costly, disruptive and unregulated labor disputes. These are amply reflected in the judicial records of the State and local federal courts of New York. They include, but are by no means limited to, (i) a ten-day strike by the Independent Association of Mutuel Employees in 1977, *see Romano* v. *Squazzo*, 98 L.R.R.M (BNA) 2102 (N.Y. Sup. Ct., Queens Co. 1978); (ii) a prolonged 45-day strike in 1979 by the DME Unit, Local 3, International Brotherhood of Electrical Workers, AFL-CIO, which succeeded to representation of NYRA's 600 mutuel clerk employees; this strike involved numerous acts of sabotage and violence, *see The New York Racing Association Inc.* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, Index No. 2276/79 (N.Y. Sup. Ct. Queens Co. Feb. 16, 1979); (iii) a strike in 1980 by the technicians employed by the American Totalisator Company to maintain and repair pari-mutuel wagering equipment at NYRA's tracks which was accompanied by violence and a refusal of other unionized workers to cross picket lines set up at NYRA's facility, *see The New York Racing Association Inc.* v. *Local Union No. 1501, International Brotherhood of Electrical Workers*, Index No. 1980-3391 (N.Y. Sup. Ct. Nassau Co. May 16, 1980); (iv) an economic strike by NYRA's union-represented maintenance unit in 1983 (at the very time this litigation was *sub judice* in the Second Circuit) which triggered a massive sympathy walkout by the mutuel clerks and other unionized employees, *see The New York Racing Association Inc.* v. *Division of Mutuel Employees, Local Union No. 3, International Brotherhood of Electrical Workers*, Index No. 9949/83 (N.Y. Sup. Ct. N.Y. Co. June 9, 1983); and (v) a large federal class action claim, filed on March 3, 1983 against the union representing NYRA's mutuel employees, and naming NYRA as a purported co-conspirator, which alleges unfair representation

of members of the union's bargaining unit,[9] *see Eatz* v. *The DME Unit of Local Union No. 3 of The International Brotherhood of Electrical Workers*, E.D.N.Y. Action No. CV. 83-0792.

At the same time that NLRB has ignored these disputes at the tracks of NYRA, the Board has extended its jurisdiction to the jai alai and casino gambling industries and to public utilities (all of which are subject to extensive "State regulation"), as well as to other professional sports and to many resort and manufacturing industries (which, *unlike* NYRA, are in fact seasonal, short-term and involved in relatively few, let alone significantly disruptive, labor disputes).[10] (33a)

No Section 14(c)(1) NLRB rules decline jurisdiction, either in whole or part, over any of the foregoing industries. Indeed, such rules exist as to only two other industries in the entire economy of the United States—*e.g.*, (i) private colleges and universities and (ii) symphony orchestras. But in both of these instances the rules (29 C.F.R. §§ 103.1 and 103.2 (1982)) explicitly provide that the NLRB will assert jurisdiction over any entity in those industries with gross annual revenues in excess of $1 million (or one-half of one percent of the approximately $200 million annual gross revenue of NYRA). (30a)

D. NYRA's Unavailing Rescission Petition

On March 26, 1979 NYRA and others involved in the horseracing industry filed petitions with the NLRB seeking the

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9 NYRA's contentious labor relations are not unique in the horseracing industry. NLRB Chairman Fanning, concurring in *Elliott Burch*, 230 N.L.R.B. 1161 (1977), wrote:

> "The last reason asserted for declining jurisdiction, the relatively few labor disputes in the industry, also appears to be just another supportive type nonreason. However, I note that just recently (March-April 1977) a labor dispute in Maryland closed down the Maryland thoroughbred racetracks (Bowie and Pimlico) for about a month and threatened to destroy that State's horseracing industry." (*Id.* at 1162)

10 Paradoxically, the Board even has asserted its jurisdiction over the bargaining unit of the on-track employees of the prime subcontractor retained by NYRA to maintain its automated pari-mutuel betting equipment. *See American Totalisator Co.*, 264 N.L.R.B. No. 148 (1982).

rescission or amendment of its Rule 103.3. (43a) NYRA's petition referred to its costly, violent 1979 strike which then was in progress (and as to which it had filed unfair labor practice charges[11]) as well as the other factors noted above.

On July 3, 1979, the NLRB, by a 3-to-2 decision, 243 N.L.R.B. 314 (1979) (43a), summarily denied NYRA's petition. Acknowledging various of the facts alleged in the petition,[12] two members of the Board totally ignored the "effect on commerce" criterion of Section 14(c)(1) and, instead, gave the following three reasons for a continuing to refuse jurisdiction over NYRA's labor disputes:

> (i) *Past practice*: "[T]he Board has consistently declined to assert jurisdiction over labor disputes in the horseracing and dogracing industries, as well as over labor disputes involving employers whose operations are an integral part of these racing industries." (44a)
>
> (ii) *Lack of Congressional disapproval*: "Congress is well aware of the Board's historic stance of declining to assert jurisdiction over horseracing and dogracing, and if Congress had wished to modify this it could easily have done so by using less restrictive language in enacting the 'Interstate Horseracing Act of 1978,' as it did in [later] modifying the Act to extend jurisdiction over health care facilities."[13] (45a) (footnote omitted)

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11 By reason of the horseracing industry rule, 103.3, the Board declined to consider the charges or issue a complaint.

12 *E.g.*, "NYRA conducts such services 52 weeks each year. NYRA employs approximately 1,500 employees. During 1978, NYRA's racing and parimutuel wagering activities generated gross revenues in excess of $189 million. . . ." (43-44a)

13 The Interstate Horseracing Act of 1978, 92 Stat. 1811, 15 U.S.C. §§ 3001-07 (Supp. V 1981), does not address labor relations in any respect. It establishes federal standards for the conduct of legal off-track betting across state lines and announces a congressional policy "to regulate interstate commerce with respect to wagering on horseracing. . . ." (§ 2, 15 U.S.C. § 3001 (Supp. V. 1981) Presumably Congress was aware of the Board's discretion, if not duty, under NLRA § 14(c)(1) to modify or withdraw an inappropriate rule.

(iii) *Backlog*: "[I]n the context of the Board's current backlog of work and inability to resolve issues promptly, an extension of our jurisdiction at this time to increase the number of proceedings coming before us would be wholly unwise." (45a)

A third NLRB member concurred in the denial of NYRA's petition, stating:

> "I would continue not to assert jurisdiction over the horseracing and dogracing industries for the reasons expressed in our prior decisions and in our Rules and Regulations, Section 103.3. Nothing has been adduced since then to warrant changing our views." (46a) (Jenkins, Board Member, concurring)

but adding:

> "The increase in our workload over the past several years, emphasized by Members Pennello and Murphy as a reason for declining jurisdiction, is immaterial." (46a)

Two members, including Chairman Fanning, dissented for the following reasons:

> "Three tracks in New York State alone require out-of-state goods and services reputedly worth more than $60 million a year. Even if the industry were to be found only in the State of New York, therefore, the viability of Section 103.3 of our Rules continues to be questionable. But the impact of this industry upon commerce between the States as a whole is far broader than that. As noted by both the Senate Commerce, Science, and Transportation Committee, and the Senate Judiciary Committee, in their reports on the recently enacted Interstate Horseracing Act:
>
> > " 'The horseracing industry in the United States is a significant industry which provides employment opportunities for thousands of individuals . . . and contributes favorably to the United States balance of trade . . . . The racing industry spends more than

> $7 billion for operating expenses and taxes. . . . Employment in the racing industry far exceeds the 175,000 people who are licensed by the National Association of State Racing Commission[s] to make their living at the Nation's racetracks. That figure . . . does not include many thousands of additional employees, such as grooms on the farms, carpenters, plumbers, electricians, van drivers, fence builders, sales company personnel, insurance people, veterinarians, harness makers, and assorted others who derive their living from the racing and breeding industries.'

"Congress' latest recognition of the substantial impact on commerce exerted by the horseracing industry is further reason for this Board to at least reconsider the rule. Current press reports also allude to the likelihood of considerable unrest in the industry as new parimutuel wagering equipment is introduced over the opposition of many employees in the industry. We should provide the structure for settling those labor disputes, as both labor and management in the industry request. Because the Board continues to fail to provide that structure, seemingly for the sole reason that it has always done so, we dissent." (47-48a) (Chairman Fanning and Board Member Truesdale, dissenting) (footnotes omitted)

E. NYRA's Unavailing Election Petition

In 1980, the International Brotherhood of Electrical Workers asserted to NYRA that NYRA's assistant starters had selected that union as their bargaining agent. On September 29, 1980, NYRA filed an election petition with the Regional Director of the NLRB pursuant to NLRA § 9(c), 29 U.S.C. § 159(c) (1976) (51a). NYRA's petition was summarily denied by letter in explicit reliance upon Rule 103.3 and the aforementioned denial of NYRA's petition for reconsideration of that regulation. (49a)

F. Proceedings in the District Court

On October 6, 1980, NYRA instituted this action against the NLRB and NYSLRB in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1337 and 1361 (1976 & Supp. V. 1981), seeking declaratory and injunctive relief invalidating Rule 103.3 as it applied to NYRA and requiring the NLRB to accept jurisdiction over labor disputes involving NYRA.[14] (26a) NYRA's complaint alleged the factors noted herein as to the nature of its business and its effect on commerce and stated that "none of the reasons which may have led the NLRB to adopt Section 103.3 in 1972 presently prevail with respect to NYRA." The NLRB filed a two-page answer which denied, in substance, knowledge or information sufficient to form a belief with respect to these allegations and advanced, as an affirmative defense, the district court's supposed lack of subject matter jurisdiction.

After denying the NLRB's motions to dismiss and for summary judgment, Chief Judge Weinstein conducted a hearing at which NYRA submitted evidence establishing the facts herein noted. (29a) The NLRB declined to submit any proof. (29a) Judge Weinstein thereafter issued an opinion in which he found that NYRA had "produced" "[a]mple evidence of the overwhelming impact of the horseracing industry on commerce, and the substantial impact of plaintiff's business . . . ." (40a) Citing this Court's decision in *Overton Park*, *supra*, 402 U.S. at 416, the district court rejected the NLRB's "committed to agency discretion" defense derived from APA § 701(a)(2), holding:

> "In determining whether an administrative agency has properly exercised its discretion, a court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . .'

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14 Assuming jurisdictional prerequisites are otherwise met, APA § 702, 5 U.S.C. § 702 (1976) (51a) entitles any "person" "adversely affected or aggrieved by agency action . . . to judicial review thereof."

> "To the extent that the factors to be considered in making the decision are controlled by statute . . . , the decision is not committed to unlimited agency discretion and is reviewable." (38a)

Applying this standard to NLRA § 14(c)(1), Judge Weinstein ruled:

> "By the terms of 29 U.S.C. § 164(c)(1), the Board may exercise its discretion to decline jurisdiction only after concluding that the labor dispute in question does not sufficiently effect commerce to warrant the Board's exercise of its jurisdiction. The statutory term 'opinion' aptly characterizes the sort of conclusion that the Board must reach in determining whether or not to exercise its discretion because that determination combines a factual inquiry—the impact of the dispute on commerce—with a value judgment—the degree of impact warranting exercise of jurisdiction. . . . When the law requires that an agency of the United States act on the basis of an opinion, the agency must inform itself before it acts.
>
> "Thus, before the Board exercises its discretion to deny jurisdiction over a labor dispute, it must take some steps to learn something about the impact that dispute may have on commerce. Pursuant, to the National Labor Relations Act, it may utilize its discretion not to exercise jurisdiction over an entire class of employers, or even over an entire industry—but only if it has arrived at a reasoned opinion that no labor dispute involving that class or industry will sufficiently impact interstate commerce." (38-39a)

The court then concluded that the amount of commerce "dependent upon the particular employer or class of employees affected" was a predominant indicium of the effect of a labor dispute on such commerce; that the NLRB had ignored this factor and had conducted no factual inquiry into it or other pertinent factual considerations; and that overwhelming proof

of NYRA's impact on commerce had been presented. (39-40a) He therefore remanded the case to the NLRB for appropriate action. (40a)

G. The Decision of the Second Circuit

The Court of Appeals of the Second Circuit reversed the district court's decision and directed dismissal of NYRA's complaint. (1a) It held that APA § 701(a)(2) barred judicial review of the NLRB's compliance with NLRA § 14(c)(1) both when it promulgated Rule 103.3 in 1973 and when it adhered to that rule in 1979 and 1980. The Court of Appeals referred to *Overton Park*, but only as the last of several possible standards of review it chose not to apply. (12a) Relying on the word "warranted" in the body of NLRA § 14(c)(1), the Second Circuit construed that portion of the section as not limiting the Board's discretion:

> "[E]ven if the effect on commerce of disputes in a particular case or industry is substantial, the Board has the power to make the judgment that the assertion of jurisdiction is not warranted. . . .
>
> "[S]ection 14(c)(1) grants broad discretion, limited only by the [pre-1959 standard] requirement of the proviso." (13-14a)

In adopting this construction, the Second Circuit made no mention of the construction of Section 14(c)(1) enunciated by the Board when it adopted Rule 103.3 (53a) and noted by this Court in *McCulloch* v. *Sociedad Nacional*, *supra*, 372 U.S. at 20 n.10 (1963).[15] Nor did the Court of Appeals deal with the logical implication of its decision—that the NLRB, without

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15 There this Court held that the National Labor Relations Act, as distinguished from the Board's jurisdictional discretion, did not extend to the maritime operations of foreign-flag ships employing alien seamen (372 U.S. at 13). This conclusion was unaffected by § 14(c)(1) which "grant[ed] the Board discretionary power *to decline jurisdiction over labor disputes with insubstantial effects*. . . ." (*Id.* at 20 n.10)

any possibility of judicial scrutiny—could simply refuse jurisdiction over all labor disputes in any new industry which has arisen since 1959 (*e.g.*, distributed data processing and cable television) however massive in size and however great the effect on commerce of its labor disputes.

Rather than deal with these matters, the Court of Appeals held that its construction and its conclusion—that "Congress[, in adopting Section 14(c)(1),] enacted no specific standards" beyond the pre-1959 proviso (14a)—was supported by the legislative history of Section 14(c)(1). (16a) Hence, the court concluded, the NLRB was free to do "far more than just measure the volume of commerce involved," and that the Board had "properly considered" the factors which it had set forth as the basis for the Rule's promulgation.[16] (18a)

The Second Circuit further held that the district court could not alternatively base its jurisdiction to review the Board's inaction upon the latter's denial of NYRA's 1980 election petition under NLRA § 9(c). (23a) Noting that such denials are not tantamount to "final orders" reviewable under NLRA § 10(f), 29 U.S.C. § 160(f) (1976), the court held that, while certain judicially-established exceptions affording district court review do exist, none was applicable here. (24a) Although the court acknowledged that the general policy of non-review is based on a factor not present here (*i.e.*, the desire to avoid interruptions of ongoing administrative proceedings), the Court of Appeals rejected "as overly broad" the view, expressed by the Eleventh Circuit in *Florida Board of Business Regulation* v. *NLRB*, 686 F.2d 1362 (11th Cir. 1982), that, in the absence of that policy factor, jurisdiction could be taken by the district court even if the prerequisites to the exceptions were not satisfied. (24a) The Second Circuit also held that decisions of this Court sustaining district courts' assertions of jurisdiction in such circumstances[17] had been overruled by

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16 The Court of Appeals also mistakenly stated that NYRA's 1979 petition purportedly had presented no new data as to any change in these factors since 1973. (18a) *But see* 29-36a, 46-48(a).

17 *Hotel Employees* v. *Leedom*, 358 U.S. 99 (1958); *Office Employees* v. *NLRB*, 353 U.S. 313 (1957).

Congress when it adopted Section 14(c)(1) in 1959. (23a) *But see Council 19, American Federation of State, County and Municipal Employees* v. *NLRB*, 296 F. Supp. 1100, 1104-05 (N.D. Ill. 1968).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Improperly Disregarded This Court's *Overton Park* Decision in Holding that APA Section 701(a)(2) Barred the District Court from Reviewing Whether the NLRB Had Exceeded the Controlling Statutory Proscriptions.

In *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court established the standard for determining when APA § 701(a)(2) forecloses judicial review of whether an administrative action has exceeded the applicable statutory bounds. The Court there held that Section 701(a)(2) is "a very narrow exception" to the general principle of reviewability, and that it is "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' " (*id.* at 410, 413).

Here the district court found ample "law to apply" in the body of Section 14(c)(1) (38-39a); the Second Circuit did not ("except for [the pre-1959] proviso, [the section] mandates nothing" (22-23a)). But, as we will now demonstrate, the Court of Appeals' conclusion is (i) contrary to the plain meaning of the "law to apply" concept and (ii) conflicts with the concept's interpretation and application by this Court and numerous other federal appellate and district courts. The Second Circuit's disposition also is in derogation of the plain language of NLRA § 14(c)(1), its legislative history and its interpretation by the NLRB and by this Court.

A. The Concept of "Law to Apply"

In *Overton Park*, this Court held that a statutory standard which (i) limited discretion if a " 'feasible and prudent alterna-

tive' " exists and (ii) conditioned its exercise upon "all possible planning to minimize harm" clearly created law to apply. The Court refused to treat the word "prudent" as justification for an administrator's "wide-ranging balance of competing interests" or as precluding judicial review of the discretion exercised by the agency. (401 U.S. at 411)

Construing the concept some years ago, the Second Circuit itself has held that "law to apply" merely requires that the statute's language or history furnish some factor which must be considered or abided by. *See Greater New York Hospital Ass'n* v. *Mathews*, 536 F.2d 494, 497 (2d Cir. 1976). The Third Circuit has construed the concept to mean that APA § 701(a)(2) creates no bar to review so long as the administrative action is not "wholly without judicially discernible limits." *See Concerned Residents* v. *Grant*, 537 F.2d 29, 35 (3d Cir. 1976). These decisions hold that if there is "some 'law' or indicia" against which a district court can "measure" or "evaluate" the administrative action, there is "law to apply." *See Greater New York Hospital Ass'n*, *supra*, 536 F.2d at 498; *Concerned Residents*, *supra*, 537 F.2d at 36. *See also In re FTC Corporate Patterns Report Litigation*, 432 F. Supp. 291, 307 (D.D.C. 1977) (some "criteria" pursuant to which the agency must make its decision). Or, as District Judge Weinstein put it in the present case:

> "To the extent that the factors to be considered in making the decision are controlled by statute . . . , the decision is not committed to unlimited agency discretion and is reviewable." (38a)

Applying these concepts, the Second Circuit previously had found sufficient "law to apply" in such a general administrative criterion as the "public interest." *See Rombough* v. *Federal Aviation Administration*, 594 F.2d 893, 895 (2d Cir. 1979). Other courts have found it to be present in such statutory terms as:

> (i) "satisfactory assurances" of payment (*Concerned Residents*, *supra*, 537 F.2d at 35);

(ii) "minimizing . . . [a] burden" (*In re FTC Corporate Patterns Report Litigation*, *supra*, 432 F. Supp. at 308);

(iii) avoiding "unnecessary" action (*In re FTC Corporate Patterns Report Litigation*, *supra*, 432 F. Supp. at 308); and

(iv) "full enjoyment" (*Sabin* v. *Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975)).

In the present case, the Second Circuit preoccupied itself with its own historic approaches to the problem of reviewability under APA § 701(a)(2); it discussed a series of decisions which either preceded or were contemporaneous in time with *Overton Park*, and it mentioned the latter precedent only at the close of its discussion. (9-12a) The Second Circuit then construed *Overton Park* to apply only if the statute in question "makes no mention of discretion, and provides clear and detailed standards for agency action." (11a) In the absence of such precision, the Second Circuit held, a host of other factors warrant consideration (*e.g.*, nature of the action, amount of expertise, legislative history). (11a)

The Second Circuit concluded, as a result, that the body of NLRA § 14(c)(1) imposes no limit whatever on the NLRB, *i.e.*, that in adopting it, "Congress enacted no specific standards," but instead utilized language which "makes clear" that the NLRB can decline jurisdiction "even if the effect on commerce of disputes in a particular case or industry is substantial" (17a); and that "section 14(c)(1) grants broad discretion limited only by the requirement of the [pre-August 1959 standards] proviso."[18] (14a) Based on this analysis, the Second Circuit concluded that Section 14(c)(1) was "like the statute in *Greater New York Hospital Ass'n* v. *Mathews*, *supra*, which had

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18 The Court of Appeals also cited the comments of certain legislative history of Section 14(c)(1) for the proposition that it "was criticized by its opponents as placing 'no limitation whatsoever upon the Board's power to deny employees and employers the protection of the National Labor Relations Act.' " (16a)

granted the Secretary of HEW complete and unreviewable discretion to determine when Medicare reimbursements would be made, so long as it was done at least once a month . . . ." (14a)

The above-described analysis of this Court's *Overton Park* standard and Section 14(c)(1) is fatally deficient and, if allowed to stand, will introduce a disturbing anomaly into this country's administrative and labor law.

From an administrative law standpoint, the Second Circuit has emasculated the "law to apply" test to a point that will foreclose a huge segment of administrative action (no matter how arbitrary or clearly erroneous) from any judicial review. Rather than simply needing "some factor" which the agency "must consider or abide by" or some "indicia" by which the propriety of administrative action may be measured or evaluated, the Second Circuit appears to be limiting *Overton Park* solely to those situations where the statute "makes no mention of discretion and provides clear and detailed standards for agency action." (11a)

Not only does such a test ignore the earlier precedents of the Second Circuit itself, as well as other courts, which found "law to apply" in statutes which would not pass muster under that Court's new test—but applied to NLRA § 14(c)(1), that the Second Circuit's analysis is contrary to the statutory language, the NLRB's analysis and the prior interpretation of this Court. Moreover, this case presents a prime illustration of the economically undesirable results which can ensue if this constricted standard is allowed to stand and district courts cannot correct plainly mistaken administrative action that is not "based on consideration of the relevant factors."

B. The Court of Appeals' Erroneous and Undesirable Misconception of NLRA § 14(c)(1)

If the Second Circuit were correct in its interpretation of Section 14(c)(1), the NLRB could decline jurisdiction of all labor disputes in a post-1959 industry, no matter how profound and disruptive their effect on commerce, without being subject

to judicial scrutiny at all. This is not only undesirable, it is patently wrong.

If as the Second Circuit held, Section 14(c)(1) granted "broad discretion, limited only by the requirement of the [pre-1959] proviso," a great portion of the statutory text would be superfluous. If the court of appeals were correct, Section 14(c)(1) would simply have stated:

> "The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers . . . *Provided*, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

Under the Second Circuit's view, the crucial statutory phrase—"where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction"—serves no function whatever.

If Congress, in drafting Section 14(c)(1), had excised the clause which the Second Circuit's analysis ignores that court would have been correct in concluding that Section 14(c)(1) resembled the "statute in *Greater New York Hospital Ass'n*." (14a) Thus, Section 14(c)(1), like the statute in that case, would have set forth no other factors for the agency to consider or abide by. Instead, the Second Circuit's reliance on the word "warrant" in Section 14(c)(1) is comparable to the rejected effort to build upon the term "prudent" in *Overton Park*. The word "warrant" may afford the Board some leeway in assessing the substantiality of a labor dispute's impact on commerce, but it is not a *carte blanche* to ignore that criterion in favor of other considerations which do not bear at all upon the "effect on commerce" standard.

This is especially so given the perception of Section 14(c)(1) expressed by the NLRB and this Court. Thus, in promulgating Rule 103.3, the Board itself described the limitations on its Section 14(c)(1) discretion as follows:

> "Under section 14(c) of the act, the Board in its discretion may decline to assert jurisdiction over labor disputes

> involving any class or category of employers *if such labor disputes will not have a substantial impact in commerce* and provided that it had not asserted jurisdiction over such class or category prior to August 1, 1959." (52a)

In short, unlike the Second Circuit, the NLRB regarded the body of Section 14(c)(1) as establishing a precondition (lack of a "substantial impact on commerce") co-equal with that of the proviso; the Board put no stock whatever in the word "warrant" (so emphasized by the Second Circuit).

Similarly, in *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), this Court construed the body of Section 14(c)(1) in a like manner, noting that the Section only granted the NLRB—

> "discretionary power to decline jurisdiction over labor disputes with insubstantial effects, with a proviso that:
>
> " '. . . the Board shall not decline jurisdiction over any labor dispute over which it would assert jurisdiction under the standards pervailing upon August 1, 1959.' " (372 U.S. at 20 n.10)

The views of the NLRB and this Court as to the "unsubstantial effect" mandate of Section 14(c)(1) are confirmed by its legislative history.[19]

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19 The Court of Appeals' reliance on the legislative history of Section 14(c)(1) to support a conclusion that Congress meant to bar judicial review is unfounded. It simply cited a concern voiced by three opponents of the measure during a floor debate (16a), ignoring other portions of the legislative history which indicate that the NLRB's discretion under Section 14(c)(1) was not regarded as without limits other than and in addition to the limits in effect prior to August 11, 1959. For example, Rep. Hiestand pointed out that:

> "H.R. 8400 [which was enacted into law], the bipartisan bill, . . . clearly specif[ies] the authority of [the] NLRE to decline jurisdiction where there is 'insufficient effect on commerce.' " 105 Cong. Rec. 14206 (1959), *reprinted in* 2 NLRB, *Legislative History of Labor Management Reporting and Disclosure Act of 1959* (1959) at 1579 (1959) ("Leg. Hist.")

(footnote continued)

In sum, the Court of Appeals erred in misconstruing the "law to apply" standard and in applying it erroneously to NLRA § 14(c)(1) in a manner which excises a key portion of that statute; contradicts the reasonable construction put thereon by NLRB and this Court; and gives the NLRB (and other agencies) *carte blanche* to exceed their statutory limits free from any judicial review.

II.

The Court of Appeals Improperly Disregarded This Court's *Overton Park* Decision and Misconstrued NLRA § 14(c)(1) in Holding that the NLRB's Promulgation of and Adherence to Its Rule 103.3 Was "Based upon a Consideration of the Relevant Factors" and Did Not Constitute "a Clear Error Of Judgment".

If the Board's promulgation and adherence to its Rule 103.3 is reviewable, its preference is to be tested by the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A) (1976). In applying this standard, *Overton Park* instructs that "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (401 U.S. at 416)

Here the district court found that the Board had paid so little attention to the facts evidencing the impact on commerce

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In addition, Senator Goldwater, speaking in support of H.R. 8400, observed:

> "I think my colleagues fear rather wrongly in this direction. To me this is one of the most important recommendations of the McClellan committee, in that it will give relief to the small businessmen. Those are the people about whom we are concerned. We are not interested in State court action in cases which apply to interstate commerce, because it is clear those are involved in interstate commerce and it is clear that the NLRB must take jurisdiction. I am talking about the little grocery store, the service station, or the main street merchant who cannot get relief from the NLRB but who will now be able to get relief from the local and State courts." 105 Cong. Rec. 16419 (1959), *reprinted in* 2 *Leg. Hist.* at 1437

of NYRA's activities and of labor disputes at its tracks that the Board should, at the very least, reconsider in the light of the record, its dogged insistence on Rule 103.3 in every case involving horseracing. (40a) The Court of Appeals, in reversing and in upholding the Board's categorical declination of jurisdiction over all aspects of the horseracing industry, ruled that the Board had properly relied for this judgment on such factors as State regulation of horseracing and the Board's current workload. (18-19a)

This analysis makes, we submit, a mockery of the teachings of *Overton Park*. There the issue was the existence of "feasible and prudent" alternatives to a proposed highway through a park. (401 U.S. at 405) Where the Congressional concern was for the protection of park lands, the reviewing court should not introduce into its calculus of relevant "factors" a "wide-ranging balancing of competing interests." (*Id.* at 411) The statute's standards define the scope of "relevant factors" and permissible judgments. *Cf. Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 51 U.S.L.W. 4953, 4956 (U.S. June 24, 1983).

Here NLRA § 14(c)(1) directs attention to labor disputes with a "not sufficiently substantial" effect on commerce to "warrant" the Board's assertion of jurisdiction. And, as we and the district court have pointed out, the factors assessed by the Board, and endorsed by the Second Circuit, when the NLRB chose to decline jurisdiction over every aspect of the horseracing industry are immaterial to the "commerce" effects of labor dispute at NYRA's tracks.[20]

The Second Circuit's decision reads "relevant factors" so broadly that it opens the way to agencies' wholesale escape from the constraints of statutory standards. A decision so at variance from accepted canons of judicial review should be considered and reversed by this Court.

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20 *Cf. Council 19, American Federation of State, County and Municipal Employees* v. *NLRB*, 296 F. Supp. 1100, 1105 (N.D. Ill. 1968) (reviewing and rejecting Board's jurisdictional distinction between proprietary and non-profit nursing homes as "bear[ing] no reasonable relationship to the homes' impact on commerce.").

III.

The Court of Appeals Improperly Held—in Direct Conflict with this Court and the Eleventh Circuit—that Judicial Review of the NLRB's Dismissal of NYRA's Election Petition Was Barred because Certain Judicial Prerequisites Applied and Were Not Satisfied.

The Court of Appeals' decision also raises—and answers improperly in conflict with decisions of this Court and a recent ruling of the Court of Appeals for the Eleventh Circuit—the important question of when a party may obtain district court review of a Board decision granting or denying an election petition filed under NLRA § 9(c), 29 U.S.C. 159(c) (1976) (51a).

It is familiar doctrine that such decisions are not normally reviewable unless they give rise to an unfair labor practice proceeding reviewable in a court of appeals pursuant to NLRA § 10(f), 49 Stat. 453 (1935), *as amended*, 29 U.S.C. § 160(f) (1976). As the Second Circuit here explained, "This delay in review . . . avoids interrupting progress towards swift administrative solutions to labor problems." (21a)

But, in such cases as *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 479 (1964), and *Leedom* v. *Kyne*, 358 U.S. 184 (1958), this Court has recognized that there are certain "extraordinary circumstances" when an aggrieved party may obtain, apart from the Section 10(f) procedure, district court review of a representation election order. One such circumstance arises when the Board has clearly acted "in excess of its delegated powers and contrary to a specific prohibition in the Act," *Leedom* v. *Kyne*, *supra*, 358 U.S. at 188.

Here the district court concluded that the Board's declination of jurisdiction over NYRA "was in violation of plaintiff's rights under the National Labor Relations Act," thus entitling NYRA to judicial review "pursuant to *Leedom* v. *Kyne*." (40a) The Court of Appeals reversed on this point, holding that, since the "Board [had] almost unlimited discretion to take or decline jurisdiction," *Leedom* v. *Kyne* provided no basis for judicial review. (23a)

This jurisdictional ruling is mistaken, we submit, for two reasons. *First*, it assumes the answer to the very question that *Leedom* leaves aggrieved parties free to pose in the district courts, *viz.* whether the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." NYRA has made, at the very minimum, a plausible case for the proposition that the Board so acted; the doctrine of *Boire* v. *Greyhound* and *Leedom* v. *Kyne* is undermined if NYRA cannot obtain judicial review of and must abide, without recourse, the Board's rejection of its claim.

Second, the Court of Appeals' jurisdictional ruling overlooks the fact that judicial review in this case will not interfere with any on-going Board proceeding. NYRA merely seeks a determination of its status under the NLRA. And, as the Eleventh Circuit recently held in *Florida Board of Business Regulation* v. *NLRB*, 686 F.2d 1362, 1370 (11th Cir. 1982):

> "Nothing in *Boire* v. *Greyhound Corp.* suggests that this limitation on the power of the district court to review Board election orders is applicable to a suit that does not seek review of a representation order or a stay of an election or the certification of election results. The State contends, and we agree, that a plaintiff who cannot seek review of the Board's order in the Court of Appeals but who claims that the Board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear his claim. See *Leedom* v. *Kyne*, 358 U.S. at 190, 79 S.Ct. at 184."

The Second Circuit recognized expressly its disagreement with the Eleventh Circuit's holding. (24a) Such conflict warrants review and resolution in this Court.

CONCLUSION

A writ of *certiorari* should issue to review the opinion and judgment entered by the Court of Appeals for the Second Circuit in this case on May 10, 1983.

Respectfully submitted,

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July 21, 1983

APPENDIX

Opinion and Judgment of the United States Court of Appeals for the Second Circuit dated May 10, 1983

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 832, 1019—August Term 1982

Argued February 3, 1983 Decided May 10, 1983

Docket Nos. 82-6252, 6258

THE NEW YORK RACING ASSOCIATION, INC.,

Plaintiff-Appellee,

—v.—

NATIONAL LABOR RELATIONS BOARD

—and—

NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge,*
LUMBARD and KEARSE, *Circuit Judges.*

Appeal from order of the United States District Court for the Eastern District of New York, remanding to the National Labor Relations Board three decisions declining to assert jurisdiction over plaintiff New York Racing Association. Held, the district court was without jurisdiction to review the agency's decisions.

Judgment reversed.

NORBERT M. PHILLIPS, New York, NY, General Counsel, New York State Labor Relations Board (James M. O'Neill, of Counsel), *for Defendant-Appellant New York State Labor Relations Board.*

CORINNA LOTHAR METCALF, Attorney, National Labor Relations Board, Washington, DC (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Assistant General Counsel for Special Litigation, National Labor Relations Board, Washington, DC, of Counsel), *for Defendant-Appellant, National Labor Relations Board.*

HENRY BISGAIER, New York, NY (Cahill Gordon & Reindel, Joel C. Balsam, William L. Dennis, P.C., Richard Coll, of Counsel), *for Plaintiff-Appellee.*

FEINBERG, *Chief Judge*:

This appeal raises complex questions regarding the jurisdiction of a district court to review a decision of the National Labor Relations Board declining to take jurisdiction over labor disputes in a particular industry.[1] Plaintiff-appellee The New York Racing Association Inc. (the Racing Association) challenges decisions of defendant-appellant NLRB declining to assert jurisdiction over the horse racing industry in general and the Racing Association in particular. The United States District Court for the Eastern District of New York, Jack B. Weinstein, Ch. J., held that the NLRB's decisions were not based on adequate factual investigations and findings, and were therefore unlawful. The district court made its own findings of fact and conclusions of law and remanded the case to the Board for further proceedings. For the reasons stated below, we hold that the district court was without jurisdiction to review the NLRB's decisions, and we reverse with instructions to dismiss the complaint.

I. Facts

The Racing Association conducts thoroughbred horse racing and pari-mutuel wagering at three racetracks in New York. There is no dispute that the Racing Association's activities affect interstate commerce and generate hundreds of millions of dollars of gross income. The relations between the Racing Association and its some 1,700 employees are nevertheless regulated by defendant-appellant New York State Labor Relations Board (the State Board) rather than by the NLRB. This is because

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1 For convenience, we hereafter refer to the National Labor Relations Board as the NLRB or the Board.

the NLRB has always declined to take jurisdiction over labor relations in the horse racing and dog racing industries. Indeed, since its creation the NLRB has never exercised all of its broad statutory jurisdiction, which extends to the limits of the commerce clause. See NLRB v. Children's Baptist Home, 576 F.2d 256, 258 n.1 (9th Cir. 1978); NLRB v. Marinor Inns, Inc., 445 F.2d 538, 541 (5th Cir. 1971). Over the years, however, the NLRB has from time to time reconsidered its policy of not regulating a particular industry, and in some instances, it has reversed its position and exercised jurisdiction. E.g., Cornell University, 183 NLRB 329 (1970) (non-profit education). Cf. Volusia Jai Alai, Inc., 221 NLRB 1280 (1975) (jai alai); El Dorado Inc., 151 NLRB 579 (1965) (casino gambling).

In 1975, the NLRB considered such a reversal of its position regarding the horse racing and dog racing industries. Following the informal rule-making procedures of the Administrative Procedure Act, 5 U.S.C. § 553, it announced in the Federal Register its intention to consider promulgating a rule asserting jurisdiction over these industries and inviting comment by interested parties. The NLRB received approximately 90 responses to this notice, the vast majority of which opposed the assertion of jurisdiction by the NLRB. After considering this record, the Board decided to continue to decline jurisdiction, and in April 1973, promulgated Rule 103.3, which provides as follows:

> The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the act involving the horseracing and dogracing industries.

38 Fed. Reg. 9507 (1973), codified at 29 C.F.R. § 103.3 (1982). The Board noted in an accompanying explanatory

statement that the states exercised extensive control over the horse racing and dog racing industries, including some aspects of labor relations. It also found that employment in these industries was generally part-time, short-term, and sporadic, suggesting that the impact on commerce was minimal and that national regulation would be difficult and ineffective. Finally, the NLRB mentioned that few labor disputes had occurred in these industries in recent years. Its conclusion was that "the impact of labor disputes in these industries is insubstantial and does not warrant the Board's exercise of jurisdiction." 38 Fed. Reg. 9537 (1973).

In 1979, the Racing Association and the American Totalisator Company, Inc., filed petitions with the NLRB requesting the Board to repeal or amend Rule 103.3 and to assert jurisdiction over the horse racing and dog racing industries. The NLRB denied these petitions and announced its intention to "continue to decline to assert jurisdiction over labor disputes in these industries." 243 NLRB 314, 315 (1979). The NLRB acknowledged that "the operations of the Petitioners herein as a part of the horseracing industry are related to interstate commerce," id., but justified its decision to continue its long-standing policy by Congress' failure to overrule it in the Interstate Horseracing Act of 1978, and by the NLRB's inability to extend its jurisdiction without aggravating its already critical backlog of work. Chairman John H. Fanning and Member John C. Truesdale dissented, stating that the industries' substantial impact on commerce, recognized by Congress in the 1978 Act, as well as predictions in the press of unrest in the industries, warranted the exercise of jurisdiction.

In 1980, the Racing Association again asked the NLRB to take jurisdiction over it, this time by filing a petition

under the National Labor Relations Act (the Act), 29 U.S.C. § 159(c)(l)(B), for an investigation and certification of bargaining representatives. Board Case No. 29-RM-635 (1980). In September 1980, the Regional Director denied the request on the grounds that "it would not effectuate the purposes of the Act to assert jurisdiction herein," relying on the Board's consistent policy on the horse racing industry, embodied in Rule 103.3.

The Association thereafter filed this suit for declaratory and injunctive relief against the 1979 decision of the NLRB as well as the 1980 decision of the Regional Director. The complaint demanded, among other things, a writ of mandamus compelling the NLRB to repeal or amend Rule 103.3 and to assert jurisdiction over the Racing Association, and a writ of prohibition forbidding the State Board to exercise any jurisdiction over the Association inconsistent with the NLRB's jurisdiction. The request that the NLRB take jurisdiction is an unusual position for an employer to espouse. It is doubtless relevant that the NLRB, unlike the State Board, hears complaints of unfair labor practices against unions brought by employers as well as the more customary charges brought against employers. Judge Weinstein denied defendants' motions to dismiss, or for summary judgment, for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. He conducted a bench trial at which the Association presented documentary and testimonial evidence; defendants did not present evidence, maintaining instead that the district court was confined to review of the administrative record.

In July 1982, the judge filed a memorandum and order remanding to the NLRB "the decisions . . . declining jurisdiction" over the Racing Association for reconsidera-

tion in light of his findings of fact and law. He set out extensive findings of fact on the dollar amount of business generated by the Association, the nature and number of the Association's work force and the conditions of employment, the NLRB's exercise of jurisdiction over other industries such as jai alai, casino gambling, utilities and hospitals, and figures on attendance and wagering at various sporting events across the country, including racing. He found that 29 U.S.C. §§ 159(c)(l) and 164(c)(l) gave rise to a statutory right of employers to representation hearings unless the NLRB's decision not to assert jurisdiction was based on a proper factual investigation leading to "a reasoned opinion that no labor dispute involving that class or industry will sufficiently impact interstate commerce." The judge found that because they violated this right, the decisions complained of in this action were reviewable by the District Court under Leedom v. Kyne, 358 U.S. 184 (1958). Judge Weinstein concluded:

> Neither in promulgating Rule 103.3 nor in denying plaintiff's petition for a representation hearing, did the Board conduct the requisite inquiry into the volume of commerce affected by potential labor disputes involving the racing industry generally or plaintiff in particular.

In deference to Board expertise, however, he declined

> to assume that the Board may not conclude that no labor dispute in the horseracing industry can substantially affect interstate commerce.

Instead, Judge Weinstein remanded the decisions to the Board for reconsideration in light of his findings of fact and law "and such other data as the Board may care to consider."

Defendants urge on appeal that the District Court did not have jurisdiction to review Rule 103.3, the 1979 decision of the NLRB, or the 1980 decision of its Regional Director, and that even if the district court did have jurisdiction, it erred in concluding that the NLRB abused its discretion in promulgating and refusing to amend or repeal the rule.

II. The District Court's Jurisdiction to Review

At the outset, it is important to distinguish the two types of decision at issue in this suit. The NLRB's promulgation of Rule 103.3 and its subsequent refusal in 1979 to repeal or amend that rule are governed by the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. See 29 U.S.C. § 156. The Racing Association's 1980 petition to the Board, on the other hand, was filed pursuant to section 9(c)(l) of the Act, 29 U.S.C. § 159(c)(l), and the Regional Director's decision represents a determination under that section that no hearing was necessary and that there would be no further proceedings. *Leedom v. Kyne*, supra, relied on by the district court in finding jurisdiction to review, provides only for review of certain section 9 proceedings. To determine whether the court had jurisdiction to review the promulgation of Rule 103.3 and the 1979 decision, we must look first to the APA.

A. Judicial Review Under the APA

1. *Review of the merits of the Board's decision.* Chapter 7 of the APA, 5 U.S.C. § 701 et seq., provides a right of judicial review of agency action to "[a] person suffering legal wrong because of agency action. . . ." 5 U.S.C. § 702. It does not, however, constitute an inde-

pendent grant of subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 107 (1977). Furthermore, chapter 7 does not apply "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Our analysis leads us to conclude that the Board's 1973 and 1979 decisions to decline jurisdiction over the horse racing industry are matters within the second of these two exceptions to judicial review, and that therefore the district court had no jurisdiction to review the agency actions.

Section 701(a)(2) of the APA has generated disagreement in the courts, see, e.g., Reece v. United States, 455 F.2d 240 (9th Cir. 1972); Langevin v. Chenango Court, Inc., 447 F.2d 296, 302-03 & n.13 (2d Cir. 1971); Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874-75 (D.C. Cir. 1970); Hospital Ass'n of New York State, Inc. v. Toia, 438 F. Supp. 866 (S.D.N.Y. 1977), and fierce debate in the law reviews, see, e.g., Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965 (1969); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968) (citing articles at 372-73 nn. 28-29); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. Pa. L. Rev. 783 (1966); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. Pa. L. Rev. 823 (1966).

The disagreement originates in the seeming inconsistency between the exception in section 701(a) of discretionary matters from the general rule of judicial review and the subsequent APA provision that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion . . . ." 5 U.S.C. § 706(2)(A). As

Judge Friendly has written, "[t]he difficulty is that if the exception were read in its literal breadth, it would swallow a much larger portion of the general rule of reviewability than Congress could have intended, particularly in light of 5 U.S.C. § 706(2)(A) . . .; yet to read the exception out completely would do violence to an equally plain Congressional purpose." Langevin v. Chenango Court, supra, 447 F.2d at 302-03.

This court has wrestled with this difficulty. In one case, it has seemed to rely on a distinction between ordinary discretion, reviewable for abuse, and discretion that is unreviewable because it " 'is not subject to the restraint of the obligation of reasoned decision. . . .' " Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966) (quoting Hart & Sacks, The Legal Process 172, 175-77 (Tent. ed. 1958)). Similarly, in Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966), the court considered the critical question for judicial review to be whether the agency had *absolute* discretion. Id. at 5. In another case, we apparently adopted Professor Davis's "formulation 'that administrative action is usually reviewable unless either (a) congressional intent is discernible to make it unreviewable, or (b) the subject matter is for some reason inappropriate for judicial consideration.' " Langevin v. Chenango Court, supra, 447 F.2d at 303 (quoting Davis, Administrative Law Treatise, 1970 Supplement, § 28.16 at 965). In a subsequent case we held that where a statute meets the test of Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)—i.e., is "drawn in such broad terms that in a given case there is no law to apply," id. at 410—judicial review is precluded by section 701(a)(2) even in the absence of clear and convincing evidence of legislative intent to make the action at issue unreviewable.

Greater New York Hospital Ass'n v. Mathews, 536 F.2d 494 (2d Cir. 1976).

Out of these various formulations, however, one general principal does emerge with reasonable clarity. As the Supreme Court said in Barlow v. Collins, 397 U.S. 159, 166-67 (1970), judicial review is the rule, and preclusion under section 701(a)(l) and (2) the exception; but if clear and convincing evidence can be shown that Congress intended to make an agency action unreviewable, then the courts are without jurisdiction. Evidence of Congressional intent can, of course, be found in many places. The starting point is the language of the statute granting the agency power. If it makes no mention of discretion, and provides clear and detailed standards for agency action, e.g., *Overton Park*, supra, or if, conversely, it allows regulation "as the Secretary believes appropriate" and provides no standards at all, Greater New York Hospital Ass'n v. Mathews, supra, 536 F.2d at 497, the inquiry need go no further: It was reasonably clear on the face of the statutes that there was jurisdiction to review in the former case but not in the latter. But in the more usual case, where the language of the statute is not in itself sufficient evidence of whether Congress intended to grant unreviewable discretion, the court will look to other indications of congressional intent: the nature of the agency action involved, the amount of expertise required, the place of the particular action and of judicial review in the overall statutory scheme governing the agency and, of course, the legislative history of the statute. See Barlow v. Collins, supra, 397 U.S. at 166 (where controversy was over the meaning of a statutory term, judicial review was particularly appropriate); Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1044 (D.C. Cir. 1979) (factors to be considered

include the impact of review on agency effectiveness and the appropriateness of issues raised for judicial review); Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 578 (3d Cir. 1979) (court must make "fair appraisal of the entire legislative scheme," considering breadth of discretion granted and extent of agency expertise involved); Greater New York Hospital Ass'n v. Mathews, supra, 536 F.2d at 498 (decision of HEW about timing of Medicare reimbursements not appropriate for judicial review); Langevin v. Chenango Court, supra, 447 F.2d at 303 (factors indicating Congress's intent to grant unreviewable discretion include the managerial nature of the agency's responsibilities, "the need for expedition to achieve the Congressional objective," and the flood of appeals that would result if this type of action were reviewable); Cappadora v. Celebrezze, supra, 356 F.2d at 6 (court considered "whether such a decision is totally committed to the judgment of the agency because of the practical requirements of the task to be performed, absence of available standards against which to measure the administrative action, or even the fact that no useful purpose could be served by judicial review"); Hospital Ass'n of New York State, Inc. v. Toia, supra, 438 F. Supp. at 868 (factors to consider in applying § 701(a)(2) exception include whether there is no law to apply, what Congressional intent was, and whether the subject matter is appropriate for judicial review). See also Saferstein, supra, especially the discussion of factors to consider in analysis of whether Congress intended to preclude review, 82 Harv. L. Rev. at 377-95.

Against this background, we turn to section 14(c) of the Act, on which the NLRB relies as authority for its policy of not asserting jurisdiction over the horse racing industry. That section provides:

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

29 U.S.C. § 164(c). The language of subsection (1) immediately suggests that the decision to decline jurisdiction is "committed to agency discretion": not only does it speak of the Board's "discretion" in a general way, but it specifically grants the Board power to decline jurisdiction "where, *in the opinion of the Board*, the effect of such labor dispute on commerce *is not sufficiently substantial to warrant* the exercise of its jurisdiction" (emphasis supplied). The italicized words make clear that even if the effect on commerce of disputes in a particular case or industry is substantial, the Board has the power to make the judgment that the assertion of jurisdiction is not warranted. The impact of labor disputes—not of the industry—on commerce is made a primary consideration,

but whether or not it is sufficient to warrant exercise of jurisdiction is a relative question, and the other factors that the Board will consider in weighing its decision are left unstated.

The extent of discretion that is inherent in these words is illuminated by the contrast with the proviso in section 14(c)(l). There, Congress imposed a precisely defined limit on the Board's discretion, stated in terms of established standards and using the clearly mandatory words "shall not." Thus, like the statute in Greater New York Hospital Ass'n v. Mathew, supra, which granted the Secretary of HEW complete and unreviewable discretion to determine when Medicare reimbursements would be made, so long as it was done at least once a month, section 14(c)(l) grants broad discretion, limited only by the requirement of the proviso.

The legislative history of section 14(c) confirms that it grants very broad discretion. We have already pointed out that the Board's jurisdiction reaches to the limits of the commerce clause, but the Board has never asserted all of that jurisdiction. As the Supreme Court noted, eight years before the enactment of section 14(c):

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 684 (1951). The horse racing and dog racing industries were among those over which the Board had never exercised its jurisdiction.

The NLRB's failure to take jurisdiction over all cases and all industries within its potential range became problematical, however, in 1957, when the Supreme Court ruled for the first time that Congress had pre-empted the field of labor relations affecting interstate commerce, thereby precluding state regulation even when the Board had declined to exercise its jurisdiction. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). This compounded the already existing problem that states were not stepping in to regulate whenever the NLRB declined to act. The result was a "no-man's-land" in labor relations, in which some businesses and industries were left completely unregulated. By 1959, when Congress addressed itself to the situation by adding section 14(c) to the Act, the Supreme Court had already taken a step towards providing a solution. In Office Employes v. NLRB, 353 U.S. 313 (1957) and Hotel Employees v. Leedom, 358 U.S. 99 (1958), the Court ruled that the Board could not rely on policies declining jurisdiction over entire classes of employees.

Congress considered continuing and extending this approach to the problem by requiring the Board to assert jurisdiction over all labor disputes within its statutory jurisdiction, that is, over all labor disputes affecting interstate commerce. H.R. 8342, 86th Cong., lst Sess., (1959), *reprinted in* 1 NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 687 (1959) [hereinafter cited as *Leg. Hist.*]. This approach was ultimately rejected because it was recognized that the Board could not cope with the volume of cases that would be thrust upon it. See, e.g., 105 Cong. Rec. 6537-38 (1959) (remarks of Sen. Goldwater), *reprinted in* 2 *Leg. Hist.* at 1143; 105 Cong. Rec. 14,346-47 (1959), (analysis introduced by Rep. Griffin), *reprinted in*

2 *Leg. Hist.* at 1522; 105 Cong. Rec. 15,546 (1959) (remarks of Rep. Dixon), *reprinted in* 2 *Leg. Hist.* at 1582. Congress also considered and rejected a version of the statute that would have required the Board to issue written standards for when it would take jurisdiction, S. 1386, 86th Cong., lst Sess. (1959), *reprinted in* 1 *Leg. Hist.* at 332, and a version requiring the states to apply federal law in cases over which the Board could have asserted jurisdiction but chose not to. S. 1555, 86th Cong., lst Sess. (1959), *reprinted in* 1 *Leg. Hist.* at 338. Instead, Congress passed a statute, which became § 14(c), that was criticized by its opponents as placing "no limitation whatsoever upon the Board's power to deny employees and employers the protection of the National Labor Relations Act." 105 Cong. Rec. 15,537, 15,542 (address of Sen. Rayburn, read into record by Rep. Thompson), *reprinted in* 2 *Leg. Hist.* at 1574, 1578. See also 105 Cong. Rec. 15,550-51 (1959) (analysis of Rep. Eliot, read into record by Rep. Bolling), *reprinted in* 2 *Leg. Hist.* at 1587; 105 Cong. Rec. 17,877 (1959) (remarks of Sen. Morse), *reprinted in* 2 *Leg. Hist.* at 1421.

In sum, the legislative history shows that in enacting section 14(c), Congress dealt with the "No-Man's land" problem by restoring the status quo ante *Guss*, supra: It expressly permitted the states to regulate labor relations when the NLRB had jurisdiction but declined to assert it, and preserved the Board's discretion to so decline. The language Congress used to describe that discretion, together with the comments of legislators who opposed this approach, strongly suggest that Congress intended also that the Board's exercise of its discretion would ordinarily be unreviewable.[2]

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[2] The State Board also argues that subsequent legislative history shows that Congress has impliedly approved the NLRB's practice of not

This conclusion is not surprising, given the nature of the decisions the NLRB makes under section 14(c)(l). Congress enacted no specific standards, nor did it require the Board to do so by regulation. The impact of labor disputes on commerce is, of course, the overall guide, but the dollar volume of business in interstate commerce is not the only yardstick that the Board can or should consider. Many other factors can be important. For instance, if the states regulate a given industry adequately, labor disputes in that industry might well be reduced to the point where their impact on commerce would be insignificant, whatever the volume of interstate commerce in the industry. In deciding whether to expend its limited resources to regulate one industry, the Board must inevitably consider the effect this will have on its efforts in other industries that are also involved in commerce. In formulating its policies on particular industries, the Board must look at the situation not just in one state, but nationwide. As the Supreme Court has noted, "where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms"—in this case, the words "sufficiently substantial to warrant the exercise of [the Board's] jurisdiction"—"the very construction of the statute is a distinct and

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asserting jurisdiction over the horse racing industry. The State Board would have us discern this approval in Congress' failure to amend the Act to require assertion of jurisdiction over this industry, despite the fact that it did amend the Act to require coverage of health care institutions. Pub. L. No. 93-360, 88 Stat. 395 (1974). The State Board also considers it significant that in enacting the Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 et seq., to regulate interstate wagering on horse racing and to prevent states from interfering with each other's regulations, Congress made an express finding that the states should have primary responsibility for regulating wagering within their borders. These arguments, while not without significance, are not necessary to our conclusion that Congress intended to preclude judicial review of the Board's horse racing policy.

profound exercise of discretion." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958). In short, when the Board decides whether the exercise of its jurisdiction is "warranted," it does far more than just measure the volume of commerce involved, taking jurisdiction over the largest industries and declining jurisdiction over the smallest.[3]

Under section 14(c)(l), the Board must make policy decisions about how best to effectuate the purposes of the national labor laws, decisions informed by its special knowledge and expertise. When it promulgated Rule 103.3 in 1973, the Board properly considered such factors as the extensive state regulation of the horse racing industry, the "unique and special relationship" between the states and the industry, the relative infrequency of labor disputes in the industry, the sporadic and short-term employment, marked by high turnover, and the difficulty thereby posed for effective Board regulation, and the Board's current workload. When the Racing Association petitioned in 1979 for amendment or repeal of the rule, it presented no data suggesting that conditions in the industry as a whole, or even in New York alone, had changed significantly in these respects since 1972-73. The Board therefore relied on its prior analysis in concluding that it should continue to decline to take jurisdiction over the horse racing industry. This is precisely the sort of decision-making that should in the normal course of things be left to the discretion of the agency to which

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3 Since the enactment of section 14(c), courts have recognized that the NLRB has unreviewable discretion to assert jurisdiction even over cases where the impact on commerce is trivial by the Board's own guidelines. NLRB v. Anthony Co., 557 F.2d 692 (9th Cir. 1977); NLRB v. Marinor Inns, Inc., 445 F.2d 538 (5th Cir. 1971); NLRB v. WGOK, Inc., 384 F.2d 500 (5th Cir. 1967).

Congress has entrusted it. This case presents no extraordinary circumstances to justify judicial review despite Congress' clear intention to preclude it—no allegations of racial discrimination are made, see Wong Wing Hang v. INS, supra, 360 F.2d at 719, and no colorable claim that the Board ignored a clear statutory mandate or exceeded its jurisdiction is raised, see Langevin v. Chenango Court, supra, 447 F.2d at 303. We are thus convinced that the District Court was without jurisdiction to review the substance of the Board's promulgation of Rule 103.3 and its 1979 decision not to repeal or amend it.

2. *Review of the Board's Procedures.* Of course, the district court would still have jurisdiction to review the procedures by which the Board reached its decisions. Indeed, the district judge's statement that "[a]t the time of the original promulgation of 103.3, the Board undertook no adequate factual investigation," and the judge's other suggestions that the Board was required to conduct hearings and make findings of fact imply that he did so. However, the record reveals that both the original promulgation of Rule 103.3 and the 1979 decision were procedurally sound. Section 14(c)(l) expressly provides that decisions to decline jurisdiction may be made "by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5." The Board complied with all of the requirements for agency informal rulemaking set out in the APA, 5 U.S.C. § 553. A proper notice of proposed rulemaking was published in the Federal Register on July 18, 1972, and interested parties were invited to submit written data and views. Responses were received and considered, and a rule was adopted and published along with an explanatory statement. 38 Fed. Reg. 9507, 9537 (1973). The APA does not mandate a

hearing unless required by statute, 5 U.S.C. § 553(c), and the Act imposes no such requirement. See 29 U.S.C. § 156; California Citizens Band Ass'n v. United States, 375 F.2d 43, 53-54 (9th Cir. 1967). Cf. Hirsch v. McCulloch, 303 F.2d 208 (D.C. Cir. 1962) (Board may not rely on mere advisory opinions in declining to assert jurisdiction over disputes in horse racing industry, but must follow statutory rulemaking procedure or conduct hearings leading to rule of decision).

The 1979 decision not to amend or repeal the rule was also procedurally sound. The APA provides simply that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. § 553(e), and the National Board has done so in its rules. 29 C.F.R. §§ 102.124, 102.125. There is no statutory requirement that the Board reopen its rulemaking procedure or hold hearings in response to such a petition. The Board gave full consideration under its rules to the 1979 petitions of the Racing Association and others, and issued a reasoned opinion denying them.

B. Judicial Review of Representation Proceedings

The third and final decision at issue in this case is the Regional Director's denial of the Racing Association's 1980 petition requesting the NLRB to take jurisdiction over it and conduct an investigation and certification of representatives under section 9 of the Act, 29 U.S.C. § 159. The Regional Director based his denial on the Board policy, embodied in Rule 103.3, not to assert jurisdiction over any labor disputes in the horse racing industry. Section 9 sets forth the steps to be followed in processing representation petitions. An employee, a union or an employer can petition the NLRB to order an election within a bargaining unit to determine whether the

employees desire union representation. Courts have long recognized that Board actions under section 9 are not subject to judicial review unless an election has been held and the Board has taken the further step of bringing an unfair labor practice proceeding under section 10, 29 U.S.C. § 160, against a dissatisfied and uncooperative party to the section 9 proceedings. Boire v. Greyhound Corp., 376 U.S. 473, 476-77 (1964); Herald Co. v. Vincent, 392 F.2d 354, 356 (2d Cir. 1968); Teamsters Local 690 v. NLRB, 375 F.2d 966, 969 (9th Cir. 1967); Lawrence Typographical Union v. McCulloch, 349 F.2d 704, 706 (D.C. Cir. 1965); National Maritime Union v. NLRB, 267 F. Supp. 117, 119 (S.D.N.Y. 1967). This delay in review is the price Congress has chosen to pay to avoid interrupting progress towards swift administrative solutions to labor problems. Boire v. Greyhound, supra, 376 U.S. at 477-78; Herald Co. v. Vincent, supra, 392 F.2d at 356; McLeod v. Local 476, United Brotherhood of Industrial Workers, 288 F.2d 198, 201 (2d Cir. 1961).

The courts have developed several exceptions to this general rule, however. Herald Co. v. Vincent, supra, 392 F.2d at 356-57; Teamsters Local 690 v. NLRB, supra, 375 F.2d at 969-72; National Maritime Union v. NLRB, supra, 267 F. Supp. at 119-20. Only one is relevant to this case: In Leedom v. Kyne, 358 U.S. 184 (1958), the Supreme Court held that the district court had jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." Id. at 188. The Court later made clear that this exception is "a narrow one," not to be applied "whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." Boire v. Greyhound Corp., supra, 376 U.S. at 481. See also

Boire v. Miami Herald Publishing Co., 343 F.2d 17 (5th Cir. 1965); Local 1545 v. Vincent, 286 F.2d 127, 132-33 (2d Cir. 1960); National Maritime Union v. NLRB, supra, 267 F. Supp. at 120-24.

The district court found that sections 9(c)(l) and 14(c)(l) of the Act grant employers like the Racing Association "a statutory right to representation hearings unless refusal of jurisdiction by the Board is specifically mandated by [section 14(c)(l)]." Despite the use of the word "shall" in section 9(c)(l), which is reproduced in the margin,[4] the section has been interpreted by the courts to afford the Board great latitude in determining whether or not to proceed with a hearing. National Maritime Union v. NLRB, supra, 267 F. Supp. at 122. Moreover, as the discussion in Part II.A.2., supra, of the discretionary nature of section 14(c)(l) makes clear, that section, except

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[4] Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(l).

for the proviso, mandates nothing. It is as far as it can be from the "clear and mandatory" requirement at issue in Leedom v. Kyne, supra, 358 U.S. at 188. In that case, the Board conceded that it had failed to comply with the provision of section 9(b)(l) that "the Board shall not" determine that a unit including both professional and non-professional employees is appropriate for collective bargaining "unless a majority of such professional employees vote for inclusion in such unit." See 358 U.S. at 188-89. Here, by contrast, the Regional Director refused to order a representation hearing in reliance on a Board policy promulgated under a statute granting the Board almost unlimited discretion to take or decline jurisdiction. *Leedom v. Kyne* provides no basis for judicial review of that refusal or of the underlying policy. See National Maritime Union v. NLRB, supra, 267 F. Supp. at 121-24.

The District Court also relied on Office Employes v. NLRB, supra, Hotel Employees v. Leedom, supra and Hirsch v. McCulloch, supra, to establish a clear mandate violated by the Board. However, such reliance is misplaced. The last case merely held that in refusing to grant representation hearings, the Board may not rely on a policy of declining jurisdiction under section 14(c)(l) that is based on advisory opinions rather than on properly promulgated rules or decisions after a hearing. As discussed above, Rule 103.3 was promulgated according to proper rulemaking procedures, thus providing a sound basis for the Regional Director's decision. *Office Employees* and *Hotel Employees* would indeed support the district court's assertion of jurisdiction, if Congress had not overruled them by enacting section 14(c). See the discussion of legislative history, in Part II.A.2., supra. See also 105 Cong. Rec. 17,877 (1949) (remarks of Sen. Morse), *reprinted in* 2 *Leg. Hist.* at 1421.

The Racing Association argues that it is unjust for the district court to have no jurisdiction in this case, because then the NLRB's 1980 representation decision will never be reviewable. In the ordinary case, as already indicated, review is merely delayed until after an election has been held and an unfair labor practice proceeding initiated; here, however, this will obviously never occur, since the Board has refused to act at all. The short answer to this argument is that "not every governmental action is subject to review by judges." United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, Ch. J.).[5] The Racing Association is in the same position as any party who seeks an election but is unsuccessful in persuading the Regional Director to order one. See, e.g., Physicians National House Staff Ass'n v. Fanning, 642 F.2d 492, 499 (D.C. Cir. 1980) (in banc), cert. denied, 450 U.S. 917 (1981). Cf. United Electrical Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966) (per curiam).[6]

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5 We believe that this disposes of the Racing Association's argument made in passing in a footnote in its brief that the lack of review denies it due process.

6 The Racing Association relies heavily upon Florida Board of Business Regulation v. NLRB, 686 F.2d 1362 (11th Cir. 1982), in which the Eleventh Circuit held that the district court had jurisdiction to rule on the request of a Florida state agency, after the NLRB had ordered representation elections, to issue a declaratory judgment that the NLRB "lacked statutory and constitutional authority to regulate labor disputes in the jai alai industry as a whole." Id. at 1369. We respectfully suggest that this case gives far too narrow a reading to the applicability of Leedom v. Kyne, supra, as construed by Boire v. Greyhound Corp., supra, 376 U.S. at 481, to district court review of section 9 proceedings.

III. Conclusion

We have considered all of appellee's arguments supporting the district court's assumption of jurisdiction, and they are without merit. The district court had no jurisdiction to review the promulgation of Rule 103.3 in 1973, the NLRB's refusal in 1979 to repeal or amend the rule, or the Regional Director's denial in 1980 of the Racing Association's petition for a representation hearing. We therefore reverse and vacate the order of the district court and remand with instructions to dismiss the complaint.

Memorandum and Order of U.S. District Court for the Eastern District of New York, 110 L.R.R.M. 3177 (July 28, 1982)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

80 Civ. 2779 (J.B.W.)

THE NEW YORK RACING ASSOCIATION INC.,
a New York corporation,

Plaintiff,

—against—

THE NATIONAL LABOR RELATIONS BOARD, et al.,

Defendants.

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MEMORANDUM AND ORDER

WEINSTEIN, Ch. J.:

Plaintiff, an association operating thoroughbred racetracks in New York State, seeks review of decisions by the National Labor Relations Board declining exercise of the Board's jurisdiction over labor disputes involving plaintiff's employees. The Board's decisions are based upon its policy of declining jurisdiction over the racing industry. Under the circumstances of this case and for the reasons set out below (1) this court has jurisdiction, and (2) the Board's decisions not to exercise jurisdiction disregarded statutory limitations on its discretion.

FACTS

Section 103.3 of the National Labor Relations Board's Rules and Regulations, promulgated in 1973, dictates that the Board shall exercise no jurisdiction to regulate labor relations in the racing industry. Plaintiff twice petitioned the Board to exercise jurisdiction over its employees, without success. American Totalisator Company, incorporated in the New York Racing

Association, Inc., 243 NLRB No. 46 (1979); New York Racing Association, Inc., Board Case No. 29-RN-635 (1980).

At the time of the original promulgation of 103.3, the Board undertook no adequate factual investigation of the impact of the racing industry on interstate commerce or on the characteristics of labor relations and labor disputes in that industry. Nevertheless, the Board made a number of factual findings on which it apparently based a decision to decline jurisdiction over this industry. The Board summarized these findings as follows:

> "In prior decisions the Board declined to assert jurisdiction over these industries noting, inter alia, the extensive state control over the industry. It appears that state law sets racing dates for the tracks; state law determines the percentage share of the gross wagers that goes to the state; and state law determines the percentage of the gross wages to be retained by the track. In addition, the state licenses employees, exercises close supervision over the industries through state racing commissions, and in many states retains the right to affect the discharge of employees whose conduct jeopardizes the 'integrity' of the industry. As the industries constitute a substantial source of revenue to the states, a unique and special relationship has developed between the states and these industries which is reflected by the state's continuing interest in and supervision over the industries.
>
> "In addition, the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force. This is further evidenced by a pattern of short workhours and sporadic and short periods of active employment with any given employer.
>
> "Besides minimizing the impact on commerce of the industries, this pattern of short-term employment also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed

both by attempts to conduct elections and to make effective any remedies for alleged violations of the act within the highly compressed timespan of active employment which is characteristic of the industries.

"Thus, we have concluded that the operations of these industries continue to be particularly related to, and regulated by, local governments and, further, that our exercise of jurisdiction would not substantially contribute to stability in labor relations. We are also not unmindful of the fact that relatively few labor disputes have occurred in these industries in recent years, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries is insubstantial and does not warrant the Board's exercise of jurisdiction."

NLRB, Declaration of Assertion of Jurisdiction, 38 *Fed. Reg.* 9537 (1973).

In reaffirming section 103.3 and applying it to plaintiff in 1979, the Board relied on these same findings of fact, and expressed a reluctance to increase the Board's adjudicative backlog. In 1980, the Board again relied upon these same findings without undertaking any new investigation.

Plaintiff brought this action for a review of these decisions on October 6, 1980, and trial was held on May 3, 1982. At trial plaintiff introduced documentary and testimonial evidence on patterns of employment and the scope of operations of the New York Racing Association. In addition, plaintiff introduced evidence on the scope of the racing and other recreation industries now regulated by the National Labor Relations Board. Defendant introduced no evidence and did not dispute the accuracy of any of plaintiff's evidence. This evidence was primarily of a documentary nature whose accuracy cannot be reasonably questioned and thus was subject to both official and judicial notice. Rule 201, Federal Rules of Evidence. On the basis of the evidence adduced at trial—all of which was readily available to the Board—the court makes the following findings of fact:

1. The New York Racing Association (NYRA) is a nondividend racing association, organized and existing pursuant to the

laws of the State of New York, whose principal business is the conduct of thoroughbred horseracing and pari-mutuel wagering at three facilities in the State of New York: Aqueduct Race Track, Belmont Race Track, and Saratoga Race Course. NYRA conducts this thoroughbred horseracing and pari-mutuel wagering for fifty-one weeks a year, alternating among its racing facilities. Each of the facilities maintains a regular staff of maintenance employees who work on a year round basis, and the other employees of NYRA either work permanently in NYRA's principal offices at Aqueduct Race Track or rotate on a year round basis among the three facilities. These employees presently number approximately 1,700.

2. NYRA's amounts of pari-mutuel wagering in the years 1978 to 1981 were: 1978, $814,000,000; 1979, $856,000,000; 1980, $928,000,000; 1981, $903,000,000.

3. NYRA's racing and pari-mutuel wagering activities generated gross revenues in excess of $189,000,000 in each of the years 1978, 1979, 1980, and 1981, including revenues from television and nationwide and international broadcasts of NYRA's events. In conducting its business activities, NYRA is the purchaser of goods and services in interstate commerce in an amount in excess of $60,000,000 in each of the years 1978, 1979, 1980, and 1981.

4. NYRA's gross revenue from the years 1978 through 1981 were: 1978, $189,477,000; 1979, $188,958,000; 1980, $226,655,000; and 1981, $229,228,000.

5. NYRA's gross revenue from non-racing sources were: 1978, $1,929,000; 1979, $1,766,000; 1980, $3,145,000; and 1981, $4,229,000.

6. NYRA's television and radio broadcast revenues were: 1978, $601,000; 1979, $531,000; 1980, $1,743,000; and 1981, $2,148,000.

7. Commencing in 1981, NYRA entered into an agreement with race tracks through the nation, as well as with a betting service in England; NYRA undertook to provide racing infor-

mation, video and audio images to these facilities. These other out-of-state and out-of-nation facilities pay NYRA a percentage of moneys bet out-of-state on NYRA races. In 1981, a total of 1.7 million dollars was wagered pursuant to such agreements. Additionally, NYRA is advised that substantial amounts of money are legally wagered in Nevada on NYRA races.

8. NYRA has entered into agreements with four out-of-state race tracks in Pennsylvania and West Virginia for the telecast of NYRA races on a weekly and sometimes daily basis. These agreements have been concluded pursuant to the Interstate Horse Racing Act of 1978, 15 U.S.C.A. §§ 3001, *et seq.* NYRA has entered into agreements with 14 out-of-state race tracks for the simulcast of the Belmont Stakes and anticipates entering into similar and even more extensive agreements with these and other race tracks for the simulcast and acceptance of pari-mutuel wagers on other NYRA events on a year round basis.

9. NYRA has received revenue from wagering at locations outside the State of New York in 1981. It is anticipated that the revenue in 1982 and future years will mean a larger revenue for NYRA since recently signed contracts with several tracks in the State of Pennsylvania provide for betting on races staged at the New York facilities and telecast at the various tracks in Pennsylvania. It is anticipated that such simulcasts to Pennsylvania will engender substantial revenues in 1982 and future years and that simulcasting will spread to tracks in other states.

10. In 1981, NYRA ran races for New York bred horses with a purse total of $9,600,000. This compared to a total of $60,000,000 in purses for all the races that NYRA ran in 1981.

11. The rate of turnover among NYRA employees is relatively low. NYRA loses very few employees by reason of voluntary quitting. Each year NYRA loses a number of employees by reason of death or retirement, and a few employees as a result of disciplinary action. With these exceptions, losses through employees' leaving NYRA's employment for other jobs are rare.

12. In NYRA's maintenance department there is a provision for hiring temporary employees and also certain employees are hired during the grass cutting season. Most of these employees are individuals who are on summer vacations from high school or college. NYRA has a permanent work force at Saratoga which works the year round. In addition, NYRA hires an additional temporary force usually composed of the same individuals from year to year. The temporary employees are hired to prepare the race course, the grounds and the building. Even with the temporary hirings at Saratoga, NYRA's temporary employees are a small part of the total complement of the employees employed by NYRA. NYRA is engaged in racing at one of its track facilities, at Aqueduct, Belmont Park or Saratoga on a year round basis and the maintenance employees are permanently stationed at the track where they are employed. The administrative employees work at the administrative offices at Aqueduct. The vast balance of NYRA's employees and those of the concessionaires, such as the suppliers of food, rotate from track to track, as racing moves from one facility to another. Included in this group, among others, are the mutuel employees, the admissions employees, parking employees, the racing department (*i.e.*, the racing officials) and the assistant starters.

13. For 1979 to 1981, NYRA statistics concerning turnovers in employment were as follows:

A. *Pari-Mutuel Department*

REGULARS

	Totals	*Total # Stricken*	*Retired*	*Deaths*	*Dimissed*	*Quits or Voluntary Resignation*	*Hired*
1979	552	45	34	5	5	1	0
1980	508	25	14	3	8	0	0
1981	473	25	19	4	2	0	0

NEW REGULARS

1979	109	3	1	2	0	0	11
1980	120	4	0	0	4	0	1
1981	121	2	0	1	1	0	0

B. *Maintenance Department*

	Totals	*Total # Stricken*	*Retired*	*Deaths*	*Dimissed*	*Quits or Voluntary Resignation*	*Hired*
1979	202	8	8	0	0	0	0
1980	194	4	3	1	0	0	2
1981	192	2	1	1	0	0	0

14. The Racing and Wagering Board of the State of New York has no duties or responsibilities in the area of the selection or any other aspect of the employment relations of NYRA's employees except that a limited number of "racing officials" is subject to the approval of the Board. These racing officials are limited to the following officials: steward, racing secretary, starter, examining veterinarian, clerk of scales, assistant clerk of scales, paddock and patrol judge, placing judges and certain other racing officials, a total of 20 out of some 1,700 employed. None of this small number of employees subject to the approval of the wagering board is represented by any unions or is involved in collective bargaining. Although most of the employees of NYRA are represented by unions and NYRA regularly negotiates in collective bargaining with the representatives of these employees, the racing board has no function and has no duties or resposibilities in connection with the collective bargaining involving NYRA's employees.

15. The states of Connecticut and Florida regulate jai alai in these states in a manner similar to the control exercised by the Racing and Wagering Board of the State of New York over NYRA, except that, to some extent, the Florida Jai Alai statute regulates the matter of labor relations. Conn. Gen. Stat. Annotated, §§ 12-574, *et seq.*; Florida Statutes Annoted, Ch. 511.

16. The control exercised by the Racing and Wagering Board of the State of New York is considerably less than that exercised over casino gambling by Nevada state agencies in the State of Nevada.

17. The NLRB has taken jurisdiction over jai alai and casino gambling.

18. The NLRB takes jurisdiction over industries closely regulated by specific state administrative agencies such as electric utility, retail alcohol beverage and hospital. *See, e.g.*, N.Y. Public Service Law §§ 64-77; N.Y. Alcoholic Beverage Control Law §§ 1-163; N.Y. Public Health Law §§ 2800-2907.

19. The amount bet at off-track horse betting facilities in the State of New York in the last four years was: in 1978, $719,387,071; in 1979, $874,313,323; in 1980, $955,026,398; and in 1981, $1,001,221,823.

20. In addition to regular television or radio broadcasts from the harness tracks (principally Yonkers and Roosevelt), racing events outside the State of New York are covered by network broadcast as follows: the Kentucky Derby, the Preakness, the $1,000,000 race at Arlington Park, Chicago, Illinois, the $1,000,000 quarter-horse race from New Mexico, the Florida Derby, the Flamingo, the Santa Anita Derby and the Bluegrass.

21. The horseracing industry encompasses a great number of kinds of employers and employees including: horse owners, breeders, trainers, jockeys, exercise boys, grooms, veterinarians, repair personnel, mutuel employees, maintenance personnel, security guards, gardeners, food and beverage dispensers and starters.

22. In 1979 there were 38,475,934 admissions to the thoroughbred racing tracks across the country. In that year $6,122,693,310 was wagered on thoroughbred racing in this country.

23. In 1980, there were 40,424,542 admissions to the thoroughbred racing tracks across the country. In that year $6,721,968,664 was wagered on thoroughbred racing in this country.

24. In 1979, there were 24,452,919 admissions to harness racing events across the country. In that year, $3,243,206,951 was wagered on harness racing through the country.

25. In 1980, there were 23,756,951 admissions to harness racing events across the country. In that year $3,288,232,678 was wagered on harness racing throughout the country.

26. In 1979, the total attendance at all horseracing events (including thoroughbred and harness) was 72,783,076. In that year a total of $10,727,974,557 was wagered on all forms of horseracing throughout the country.

27. In 1980, the total attendance at all horseracing events (including thoroughbred and harness) was 74,689,625. In that year a total of $11,218,028,761 was wagered on all forms of horseracing throughout the country.

28. In 1979, the total revenue to the states from horseracing in the United States was $680,919,798.

29. In 1980, the total revenue to the states from horseracing in the United States was $712,727,523.

30. In 1979, the total stakes and purse distribution for all horseracing in the United States was $569,122,557.

31. In 1980, the total stakes and purse distribution for all horseracing in the United States was $625,218,264.

32. In 1979, wagering on jai alai was conducted in four states: Connecticut, Florida, Nevada and Rhode Island. No figures are available for Nevada. In Connecticut, Florida and Rhode Island the total attendance was 7,679,633; the total pari-mutuel turnover was $545,406,998; and the total revenue to the states was $36,036,607.

33. In 1980, wagering on jai alai was conducted in four states: Connecticut, Florida, Nevada and Rhode Island. No figures are available for Nevada. In Connecticut, Florida and Rhode Island the total attendance was 6,521,427; the total pari-mutuel turnover was $501,481,944; and the total revenue to the states was $35,308,705.

34. In the State of Florida, in 1980 pari-mutuel turnover in horseracing was $445,371,832, and in jai alai was

$269,270,115; in 1979, pari-mutuel turnover in horseracing was $426,403,525 and in jai alai was $287,768,674.

35. In the State of Connecticut in 1980, pari-mutuel turnover in horseracing was $162,230,811 and in jai alai was $209,175,237; and in 1979, pari-mutuel turnover in horseracing was $132,148,174 and in jai alai was $223,396,154.

36. In 1980, paid attendance at all National Football League professional football games was 16,824,762. In 1980, paid attendance at American League professional baseball games was 21,890,052 and paid attendance at National League professional baseball games was 21,124,084.

37. The sport with the largest attendance in the United States is horseracing, followed by baseball and football. The Board has asserted jurisdiction over professional football and baseball.

LAW

1. *Jurisdiction*

The power of district courts to review decisions of the National Labor Relations Board is severely limited. Review of actions of the Board to ascertain whether they violated the Board's statutory mandate is permitted to secure rights specifically protected by statute. *Leedom* v. *Kyne*, 358 U.S. 184, 189, 190 (1958); *Boire* v. *Greyhound Corp.*, 376 U.S. 483 (1964). Mere errors of fact or interpretation are not, by themselves, sufficient to trigger review pursuant to *Leedom*. *Boire* v. *Greyhound Corp.*, *supra*. A failure to engage in proper fact-finding, however, when it implicates a statutory right, can give rise to district court review. *Hirsch* v. *McCullough*, 303 F.2d 208, 212-213 (D.C. Cir. 1962).

2. *Statutory Standards*

Decisions of the Board to accept or decline jurisdiction over representation controversies implicate such a statutory right. The National Labor Relations Act provides that:

> "Whenever a petition shall have been filed . . . by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized by their employer as the [bargaining] representative . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

29 U.S.C. § 159(c)(1). The courts have protected this right by preventing the Board from dismissing petitions where the Board's action is based upon a policy of declining jurisdiction over classes of employers. *Hotel Employees* v. *Leedom*, 358 U.S. 99 (1958); *Office Employees* v. *N.L.R.B.*, 353 U.S. 313 (1957).

In 1959, Congress modified employers' right to a representation hearing by granting the N.L.R.B. severely bounded discretion to decline jurisdiction. The declination must be based on the lack of substantial impact on interstate commerce. The provision reads:

> "The Board, in its discretion, may by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ."

29 U.S.C. § 164(c)(1).

Subsequent to this amendment courts have continued to recognize a statutory right to representation hearings unless refusal of jurisdiction by the Board is specifically mandated by the amendment. *Hirsch* v. *McCullough*, 303 F.2d 208, 212 (D.C. Cir. 1962). Refusal of jurisdiction not in conformity with 29 U.S.C. § 164(c)(1) is a denial of a statutory right reviewable pursuant to *Leedom* v. *Kyne*.

This statutory provision permits declination of jurisdiction over a class or category of employees by promulgation of a

rule in accordance with the strictures of the administrative procedure act. That act directs a court of review to "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A). In determining whether an administrative agency has properly exercised its discretion, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

These standards merely delineate the proper role of a court reviewing an agency decision rendered pursuant to the administrative procedure act; they do not provide an independent basis for jurisdiction to review. To the extent that the decision whether to grant a representation hearing is committed to the Board's discretion, this court has no power to intervene, either under the Administrative Procedure Act (5 U.S.C. § 701(a)(2)) or the *Leedom* v. *Kyne* exception. To the extent that the factors to be considered in making the decision are controlled by statute, however, the decision is not committed to unlimited agency discretion and is reviewable.

By the terms of 29 U.S.C. § 164(c)(1), the Board may exercise its discretion to decline jurisdiction only after concluding that the labor dispute in question does not sufficiently effect commerce to warrant the Board's exercise of its jurisdiction. The statutory term "opinion" aptly characterizes the sort of conclusion that the Board must reach in determining whether or not to exercise its discretion because that determination combines a factual inquiry—the impact of the dispute on commerce—with a value judgment—the degree of impact warranting exercise of jurisdiction. Among the many definitions of "opinion" to be found in Webster's Third International is one particularly useful in this context: "a belief or view based on interpretation of observed facts and experience." Government officials, unlike people besotted by love or hate, may not form an opinion on the basis of whim, caprice, or impulse. When the law requires that an agency of the United

States act on the basis of an opinion, the agency must inform itself before it acts.

Thus, before the Board exercises its discretion to deny jurisdiction over a labor dispute, it must take some steps to learn something about the impact that dispute may have on commerce. Pursuant to the National Labor Relations Act, it may utilize its discretion not to exercise jurisdiction over an entire class of employers, or even over an entire industry—but only if it has arrived at a reasoned opinion that no labor dispute involving that class or industry will sufficiently impact interstate commerce. If the Board does not have such an opinion, it may not lawfully promulgate such a rule. If the Board has good reason to believe that some labor disputes within an industry will sufficiently effect interstate commerce, it may not decline jurisdiction over the entire industry, even if it believes that most disputes within the industry will not significantly effect commerce.

Under the terms of the Act a

> " 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment regardless of whether the parties to the dispute stand in proximate relation of employer and employee."

29 U.S.C. § 152(9). Affecting commerce "means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152(7). Before a labor dispute is resolved it cannot be said whether it will burden commerce or benefit it, but it will certainly affect it—even if it be by avoiding its disruption. How substantial the effect will be is determined by how much commerce is dependent on the particular employer or class of employers affected. This kind of factual estimation is required of the Board before it may conclude that its jurisdiction is discretionary.

APPLICATION OF LAW TO FACTS

Neither in promulgating Rule 103.3 nor in denying plaintiff's petition for a representation hearing did the Board conduct the requisite inquiry into the volume of commerce affected by potential labor disputes involving the racing industry generally or plaintiff in particular. Accordingly, the Board's exercise of discretion to decline jurisdiction over plaintiff was in violation of plaintiff's rights under the National Labor Relations Act. Pursuant to *Leedom* v. *Kyne*, this court has both the jurisdiction and the obligation to vacate these decisions of the Board.

Ample evidence of the overwhelming impact of the horseracing industry on commerce, and the substantial impact of plaintiff's business has been produced. The evidence has shown that industries with less impact are regulated by the Board and that many of the employers regulated by the Board have a much smaller impact on commerce than does the New York Racing Association. It is, however, conceivable—however implausible—that every single lesser labor dispute has been accepted by the Board on a discretionary basis, while only disputes with even greater impact on commerce than those involving horseracing have "warranted" exercise of the Board's jurisdiction. The Board has made no such determination since it has apparently been operating under the misapprehension that its jurisdiction was entirely discretionary with respect to horseracing. District courts are far too respectful of the specialized expertise of the Board to assume that the Board may not conclude that no labor dispute in the horseracing industry can substantially affect interstate commerce.

Accordingly, the decisions of the Board declining jurisdiction over plaintiff are remanded to the Board for reconsideration in light of such findings of fact and law set forth above and such other data as the Board may care to consider.

So ordered.

Dated: Brooklyn, New York
July 28, 1982

/s/ JACK B. WEINSTEIN

Jack B. Weinstein, Chief Judge

Judgment of District Court filed July 30, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

80 CV-2779 (JBW)

FILED
in Clerk's Office
U.S. District Court E.D.N.Y.

THE NEW YORK RACING ASSOCIATION, INC.,
a New York corporation,

Plaintiff,

—against—

THE NATIONAL LABOR RELATIONS BOARD, et al.,

Defendants.

JUDGMENT

A memorandum and order of Honorable Jack B. Weinstein, United States District Judge, having been filed on July 28, 1982, remanding the decisions of the National Labor Relations Board, which declined jurisdiction over plaintiff, for reconsideration in light of the Court's findings of fact and law, and such other data as the Board may wish to consider, it is

ORDERED and ADJUDGED that judgment is hereby entered remanding for reconsideration the decisions of the National Labor Relations Board, which declined jurisdiction over plain-

tiff, in light of the Court's findings of fact and law, and such other data as the Board may wish to consider.

RICHARD H. WEARE,
Clerk of Court

By: /s/ ROBERT C. HEINEMANN
Robert C. Heinemann,
Chief Deputy Clerk

Dated: Brooklyn, New York
July 29, 1982

NLRB Order of July 3, 1979, 243 N.L.R.B. 314, Denying Petitions to Repeal or Amend 29 C.F.R. § 103.3

American Totalisator Company, Inc. and The New York Racing Association Inc. and Service Employees International Union (SEIU)

July 3, 1979

ORDER DENYING PETITIONS

Pursuant to Section 102.124 of the Board's Rules and Regulations, Series 8, as amended, petitions herein were filed by American Totalisator Company, Inc. (hereinafter called ATC) on February 9, 1979, and by The New York State Racing Association Inc. (hereinafter called NYRA) on March 26, 1979, seeking to repeal or, in the alternative, to amend Section 103.3 of the Board's Rules and Regulations and to assert jurisdiction over the horseracing and dogracing industries. On May 11, 1979, the Service Employees International Union (hereinafter called SEIU) requested permission to intervene and file its own petition. On May 22, 1979, the Board granted SEIU's request. On June 14, 1979, SEIU filed a statement of position in support of its petition urging the Board to amend Section 103.3 and assert jurisdiction.

In pertinent part, the petitions allege that: ATC is engaged in supplying parimutuel betting equipment and services to racetracks throughout the United States and Canada. ATC regularly employs several hundred persons at such tracks and is a party to a nationwide collective-bargaining agreement covering such employees.

NYRA is a New York corporation whose principal business is the conduct of thoroughbred horseracing and parimutuel wagering at three facilities—Aqueduct Race Track, Belmont Park Race Track, and Saratoga Race Course. Alternating between these three facilities, NYRA conducts such services 52 weeks each year. NYRA employs approximately 1,500 employ-

ees. During 1978, NYRA's racing and parimutuel wagering activities generated gross revenues in excess of $189 million (including television revenues from nationwide and international broadcasts).

The Board, pursuant to Section 102.135 of the Board's Rules and Regulations, has considered the petitions. Although the operation of the Petitioners herein as a part of the horseracing industry are related to interstate commerce, the Board has consistently declined to assert jurisdiction over labor disputes in the horseracing and dogracing industries, as well as over labor disputes involving employers whose operations are an integral part of these racing industries. See *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950) (horseracing track); *Jefferson Downs, Inc.*, 125 NLRB 386 (1959) (horseracing track); *Meadow Stud, Inc.*, 130 NLRB 1202 (1961) (horse owner/breeder); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959) (horseracing track); *Walter A. Kelley*, 139 NLRB 744 (1962) (horse owners/breeders); *Centennial Turf Club, Inc.*, 192 NLRB 698 (1971) (horseracing track); *Yonkers Raceway, Inc.*, 196 NLRB 373 (1972) (horseracing track); *Jacksonville Kennel Club*, Case 12-RC-3815, May 5, 1971 (dogracing track) (not reported in NLRB volumes). See also Section 103.3 of the Board's Rules and Regulations.

Our dissenting colleagues point to the congressional action regulating interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States, selecting from the legislative history those statements they deem to support their view. However, they quote those portions out of context of the congressional findings that:[1]

> (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders;
>
> (2) the Federal Government should prevent interference by one State with the gambling policies of another,

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1 Interstate Horseracing Act of 1978, Public Law 95-515, 95th Congress, Stat. 1811.

and should act to protect identifiable national interests; and

(3) in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.

Obviously, Congress was concerned only with off-track wagering and with the protection of the relations between the States themselves; it was not concerned with the other aspects of racing to which our colleagues allude. Congress is well aware of the Board's historic stance of declining to assert jurisdiction over horseracing and dogracing, and if Congress had wished to modify this it could easily have done so by using less restrictive language in enacting the "Interstate Horseracing Act of 1978," as it did in modifying the Act to extend jurisdiction over health care facilities.[2] Consequently, while the selected comments, taken out of context, may appear to support the dissenters' position, an examination of the entire quote shows they are in error. There is absolutely no valid basis for their conclusion.

Absent an indication from Congress that the Board's refusal to assert jurisdiction is contrary to congressional mandate, we are not persuaded that we should exercise our discretion to reverse our prior holdings on this issue. The fact that two members of the Board would exercise their discretion differently and assert jurisdiction is of no significance.

Furthermore, in the context of the Board's current backlog of work and inability to resolve issues promptly, an extension of our jurisdiction at this time to increase the number of proceedings coming before us would be wholly unwise. Hearings before administrative law judges are scheduled *4 to 6 months* after the issuance of complaints instead of the preferred *4 to 6 weeks*. Although the Board is now in a crisis situation in this respect, our dissenting colleagues would only multiply the problem by asserting jurisdiction over a whole new industry.

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2 Public Law 93-360, 93d Cong., § 3203, 88 Stat. 395.

After carefully considering the statements of position submitted by the Petitioners in support of their petitions, the Board has decided not to alter its policy with respect to the horseracing and dogracing industries and has concluded that it will continue to decline to assert jurisdiction over labor disputes in these industries.

Accordingly,

It is hereby ordered that ATC's, NYRA's, and SEIU's petitions requesting the Board to repeal or amend Section 103.3 of the Board's Rules and Regulations to assert jurisdiction over the horseracing and dogracing industries be, and they hereby are, denied.

MEMBER JENKINS, concurring:

I would continue not to assert jurisdiction over the horseracing and dogracing industries for the reasons expressed in our prior decisions and in our Rules and Regulations, Section 103.3. Nothing has been adduced since then to warrant changing our views. The increase in our workload over the past several years emphasized by Members Penello and Murphy as a reason for declining jurisdiction, is immaterial. The Board can and should continue to carry out the mandate of Congress and the statute even as more people seek its benefits, instead of excluding industries *seriatim* in accordance with our personal notions of who is too unimportant to be allowed to invoke the Act.

CHAIRMAN FANNING and MEMBER TRUESDALE, dissenting:

For the reasons stated in Chairman Fanning's dissenting opinion in *Centennial Turf Club, Inc.*, 192 NLRB 698, 699 (1971), and his concurring opinion in *Elliott Burch*, 230 NLRB 1161, 1162 (1977), we would process the instant petition.

Three tracks in New York State alone require out-of-state goods and services reputedly worth more than $60 million a year. Even if the industry were to be found only in the State of New York, therefore, the viability of Section 103.3 of our Rules continues to be questionable. But the impact of this industry upon commerce between the States as a whole is far broader than that. As noted by both the Senate Commerce, Science, and Transportation Committee, and the Senate Judiciary Committee, in their reports on the recently enacted Interstate Horseracing Act:[3]

> The horseracing industry in the United States is a significant industry which provides employment opportunities for thousands of individuals . . . and contributes favorably to the United States balance of trade. . . . The racing industry spends more than $7 billion for operating expenses and taxes. . . . Employment in the racing industry far exceeds the 175,000 people who are licensed by the National Association of State Racing Commissioner to make their living at the Nation's racetracks. That figure . . . does not include many thousands of additional employees, such as grooms on the farms, carpenters, plumbers, electricians, van drivers, fence builders, sales company personnel, insurance people, veterinarians, harness makers, and assorted others who derive their living from the racing and breeding industries.[4]

Congress' latest recognition of the substantial impact on commerce exerted by the horseracing industry is further reason for this Board to at least reconsider the rule. Current press reports also allude to the likelihood of considerable unrest in the industry as new parimutuel wagering equipment is intro-

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3 Public Law 95-515, 92 Stat. 1811, October 25, 1978.

4 S. Rept. on § 1185 (Commerce, Science, and Transportation Committee) No. 95-554, October 27, 1977 at 3. Substantially identical language appears in the report on S1185 of the Senate Judiciary Committee, No. 95-1117, August 14, 1978 at 4-5.

duced over the opposition of many employees in the industry. We should provide the structure for settling those labor disputes, as both labor and management in the industry request. Because the Board continues to fail to provide that structure, seemingly for the sole reason that it has always done so, we dissent.

Order of NLRB Denying NYRA's Petition under NLRA § 9

[On letterhead of National Labor Relations Board Region 29, 16 Court Street, Brooklyn, N.Y. 11241]

September 30, 1980

New York Racing Association, Inc.
P.O. Box 90
Jamaica, New York 11417

Re: New York Racing Association, Inc.
Case No. 29-RM-635

Gentlemen:

The above-captioned case, petitioning for an investigation and certification of representatives under Section 9 of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, it appears that, because it would not effectuate the purposes of the Act to assert jurisdiction herein, further proceedings are not warranted at this time. The employer herein is an employer in the horseracing industry. The Board has consistently declined to assert jurisdiction over labor disputes in the horseracing industry and Section 103.3 of the Board's Rules and Regulations specifically provides that "[t]he Board will not assert its jurisdiction in any proceeding under Section 8, 9 and 10 of the Act involving the horseracing and dogracing industries." I am therefore dismissing the petition in this matter. See *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950); *Jefferson Downs, Inc.*, 125 NLRB 386 (1959); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959); *Yonkers Raceway, Inc.*, 196 NLRB 373 (1972); *American Totalisator Company, Inc.*, 243 NLRB No. 46 (1979).

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such a review with the National Labor Relations

Board, Washington, D.C. 20570. A copy of such request for review must be served upon each of the other parties to the proceeding, including the undersigned. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request (*original and seven copies*) must be received by the Board in Washington, D.C. by the close of business on October 14, 1980. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of any such request must be served upon each of the other parties including the undersigned. A statement of service of such request must be submitted to the Board.

Very truly yours,

/s/ SAMUEL M. KAYNARD
Samuel M. Kaynard
Regional Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc: National Labor Relations Board
Washington, D.C. 20570

William L. Dennis, Esq.
80 Pine Street
New York, N.Y. 10005

Statutory Materials

(1) 5 U.S.C. § 701(a) (1976) provides:

> "This chapter [5 U.S.C. §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—
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> "(1) statutes preclude judicial review; or
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> "(2) agency action is committed to agency discretion by law."

(2) 5 U.S.C. § 702 (1976) provides, in pertinent part:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

(3) National Labor Relations Act ("NLRA") § 9(c)(1), added by Act of June 23, 1947, ch. 120, 61 Stat. 143, *as amended*, 29 U.S.C. § 159(c)(1) (1976), provides:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that

their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

(4) NLRA § 14(c)(1), added by Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 541, 29 U.S.C. § 164(c)(1) (1976), provides:

"The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to [the Administrative Procedure Act], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

(5) NLRB Rule § 103.3, 38 *Fed. Reg.* 9507 (1973), 29 C.F.R. § 103.3 (1982), provides:

"*Horseracing and dogracing industries.*

"The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the act involving the horseracing and dogracing industries."

(6) Statement issued by NLRB concurrently with the issuance of Rule § 103.3* in 1973:

"DECLINATION OF ASSERTION OF JURISDICTION

"On July 18, 1972, the Board published in the FEDERAL REGISTER a notice of proposed rulemaking which invited interested parties to submit to it (1) data relevant to defining the extent to which the horseracing and dogracing industries are in commerce as defined in section 2(6) of the National Labor Relations Act, and to assessing the effect upon commerce of a labor dispute in those industries, (2) statements of views or arguments as to the desirability of the Board exercising jurisdiction, and (3) data and views concerning the appropriate jurisdictional standards which should be established in the event the Board decides to promulgate a rule exercising jurisdiction over those industries. The Board received 96 responses to the notice. After careful consideration of all the responses, the Board has concluded that it will not assert jurisdiction over the horseracing and dogracing industries. A rule declining to assert such jurisdiction has been issued concurrently with the publication of this notice.[1]

"The jurisdiction of the National Labor Relations Board under section 9 of the National Labor Relations Act, as amended,[2] to determine questions concerning

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* 38 *Fed. Reg.* 9537 (1973).

1 See title 29, ch. 1, pt. 103, *supra*.

2 61 Stat. 140, 143, 146, 29 U.S.C. secs. 158, 159, 160.

representation, and under section 10 of the act to prevent unfair labor practices, extends to all such matters which 'affect Commerce' as defined in section 2(7) of the act.[3] Under section 14(c) of the act,[4] the Board in its discretion may decline to assert jurisdiction over labor disputes involving any class or category of employers if such labor disputes will not have a substantial impact in commerce and provided that it had not asserted jurisdiction over such class or category prior to August 1, 1959. The Board has consistently declined to assert jurisdiction over labor disputes in the horseracing and dogracing industries[5] as well as over labor disputes involving employers whose operations are an integral part of these racing industries.[6] After carefully considering the responses, the Board has decided not to alter its position with respect to the horseracing and dogracing industries and has concluded that it will continue to decline to assert jurisdiction over labor disputes in these industries.

"In prior decisions, the Board declined to assert jurisdiction over these industries noting, inter alia, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the

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3 61 Stat. 137, 29 U.S.C. sec. 152(7). See *N.L.R.B.* v. *Fainblatt, et al.*, 306 U.S. 601.

4 29 U.S.C. sec. 164.

5 *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (horseracing track); *Jefferson Downs, Inc.*, 125 NLRB 386 (horseracing track); *Meadow Stud, Inc.*, 130 NLRB 1202 (horse owner/ breeder); *Hialeah Race Course, Inc.*, 125 NLRB 388 (horseracing track); *Walter A. Kelley*, 139 NLRB 744 (horse owners/breeders); *Centennial Turf Club, Inc.*, 192 NLRB No. 97 (horseracing track); *Yonkers Raceway, Inc.*, 196 NLRB No. 81 (horseracing track); *Jacksonville Kennel Club*, Case 12-RC-3815, May 5, 1971 (dogracing track) (not reported in NLRB volumes).

6 *Pinkerton's National Detective Agency*, 114 NLRB 1363; *Hotel & Restaurant Employees & Bartenders International Union*, Local 343 (Resort Concessions, Inc.), 148 NLRB 208.

State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the 'integrity' of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States continuing interest in and supervision over the industries.

"In addition, the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force. This is further evidenced by a pattern of short workhours and sporadic and short periods of active employment with any given employer.

"Besides minimizing the impact on commerce of the industries, this pattern of short-term employment also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the act within the highly compressed timespan of active employment which is characteristic of the industries.

"Thus, we have concluded that the operations of these industries continue to be peculiarly related to, and regulated by, local governments and, further, that our exercise of jurisdiction would not substantially contribute to stability in labor relations. We are also not unmindful of the fact that relatively few labor disputes have occurred in these industries in recent years, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries is insubstantial and does not warrant the Board's exercise of jurisdiction.[7]

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7 *Walter A. Kelley*, supra.

"Accordingly, for the above reasons, the Board[8] reaffirms its earlier conclusion and declines to assert jurisdiction over these industries.

"Member Fanning does not join in the Board's conclusion to decline to assert its jurisdiction over the said industries, based on the reasons spelled out in his dissenting position in *Centennial Turf Club Inc.*, 192 NLRB No. 97."

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8 Chairman Miller and members Jenkins, Kennedy, and Penello.